HONG LEONG EQUIPMENT SDN. BHD.

v.

LIEW FOOK CHUAN & ANOTHER APPEAL

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
SITI NORMA YAAKOB JCA
AHMAD FAIRUZ JCA
[CIVIL APPEAL NO: W-04-19-94]
8 FEBRUARY 1996

ADMINISTRATIVE LAW: *Exercise of administrative powers - Dismissal from employment after domestic inquiry - Application to Minister to refer dispute to Industrial Court - Discretion of Minister - Minister refusing to refer dispute to Industrial Court - Application for order of certiorari to quash Minister's decision and for mandamus to refer the matter to Industrial Court - Representation by workman not perverse, frivolous or vexatious - Failure of Minister to give reasons - Whether decision of Minister subject to judicial review - Whether decision not to refer to Industrial Court liable to be quashed by certiorari - Whether Court can issue mandamus for Minister to refer matter to Industrial Court - Industrial Relations Act 1967, s. 20(3).*

ADMINISTRATIVE LAW: *Exercise of judicial powers - Jurisdiction - Powers conferred by para. 1 of Schedule to Courts of Judicature Act 1964 upon the High Court - Court not fettered by English common law - Court at liberty to fashion appropriate remedy to fit factual matrix of particular case and to give such relief as meets the ends of justice - Court free to build up Malaysian common law.*

CONSTITUTIONAL LAW: *Fundamental liberties - Liberty of person - Provision in Federal Constitution that the person shall not be deprived of his life save in accordance with law - Expression "life" wide enough to encompass right to livelihood - Federal Constitution, Art. 5(1).*

STATUTORY INTERPRETATION: *Construction of statutes - Industrial Relations Act 1967 a piece of beneficial social legislation - Should be given a broad and liberal interpretation - High standards of social justice carefully established by framers of Federal Constitution and by Legislature in enacting Industrial Relations Act 1967 - Should not be consciously lowered by the decisions of the Courts.*

LABOUR LAW: *Employment - Dismissal - Employee dismissed after domestic inquiry - Application to Minister to refer matter to Industrial Court - Application refused by Minister - No reasons given - Application for certiorari and mandamus - Representation by employee not perverse, frivolous or vexatious - Application allowed - Industrial Relations Act 1967, s. 20(3).*

The respondent in this case who was employed as general manager of the appellant company was summarily dismissed for alleged misconduct on 22 February 1990. The matters relied on by the appellant company were that he had actively participated in the negotiations for the purchase of a piece of land which was bought by a company within the Hong Leong Group when his brother was the broker, and that he had failed to inform the company of his part in the negotiations and of his brother's interest in the land transaction. The appellant company sent a letter to the respondent asking him to explain his conduct and part in the negotiations. Later the appellant company sent another letter to the respondent alleging that he had taken up employment or employed himself in another business belonging to another company. The respondent replied to these letters and subsequently the appellant conducted a domestic inquiry against the respondent. Three charges were specifically put to the respondent. He denied all of them and gave an oral explanation of each. The appellant later informed the respondent by letter that he was dismissed from service with immediate effect. After his dismissal the respondent lodged a complaint with the Registrar-General of Industrial Relations under s. 20(1) of the Industrial Relations Act 1967 ('the IRA'). A conciliatory meeting was held by the office of the Director of Industrial Relations but it came to nought because the parties could not arrive at an amicable settlement. The respondent then wrote to the Deputy Director alleging that he was unjustifiably dismissed because of vindictive action by the group managing director of Hong Leong and asking that the matter be referred to the Industrial Court.

The Director-General of Industrial Relations thereupon reported to the Minister that the representations made by the respondent could not be settled. The Minister having considered the report of the Director-General and acting upon the strength of the material available to the Director-General came to the conclusion that the respondent's representation ought not be referred to the Industrial Court for adjudication. This decision was communicated to the respondent and the respondent then took out an application for certiorari to quash the Minister's decision and for an order of mandamus to compel the Minister to refer the dispute to the Industrial Court. The appellant later applied to be joined as a party to the proceedings and this was allowed. In the High Court the learned Judge granted the relief sought. The appellant and the Minister then appealed to the Court of Appeal.

The submissions of Counsel for the appellant and for the Minister could be summarised as follows:

(1) Section 20(3) of the Act confers a discretion upon the Minister whether to refer or not to refer to the Industrial Court, representations made under s. 20(1) of the Act. When he exercised his discretion not to refer the respondent's complaint to the Industrial Court, he did not take any decision in the legal sense;

(2) The question whether, on the material before him, the dispute merits reference is for the Minister to decide. If the report of the Director-General discloses a dispute involving serious issues of fact or of law, then the Minister ought to refer the dispute to the Industrial Court. However, in respect of the present case, there were no such issues, so that the Minister was quite right in not referring the dispute:

(3) Following from submission (2), in this case there is an additional factor which weighed heavily in favour of the Minister's exercise of discretion against the respondent. The domestic inquiry which was conducted by the appellant found the respondent guilty of the misconduct alleged against him. Some of the facts and contentions raised before the High Court were never mentioned by the respondent at the domestic inquiry. The material before the Minister was therefore quite different from that which was later placed before the learned Judge;

(4) The discretion of the Minister is subject to judicial review, but only if he misconstrued the statutory provision under which he acted or took into account irrelevant considerations or failed to take into account relevant considerations or asked himself the wrong question or came to a decision which was irrational. In other words, the Minister's exercise of discretion is safe from judicial review if he did not commit what was learned an "Anisminic error" in *Syarikat Kenderaan Melayu Kelantan Bhd. v. Transport Workers' Union* [1995] 2 CLJ 748; [1995] 2 MLJ 317, 342, or if his decision was not affected by what has come to be known as "Wednesbury unreasonableness";

(5) A Court is not entitled to scrutinise the facts of a case for the purpose of deciding whether the Minister had exercised his discretion in accordance with law as this would amount to an exercise of appellate jurisdiction and therefore in violation of the principles governing judicial review. The learned Judge in the Court below did in fact carry out such an examination and thereby exceeded the permitted ambit;

(6) Even if a scrutiny of the factual matrix is permissible, there was, in this case, ample material before the Minister to justify his decision and any reasonable Minister similarly circumstanced as this Minister would have come to the conclusion;

(7) The learned Judge when quashing the Minister's decision not to refer, did not identify the irrelevant considerations which the latter had taken into account or the relevant considerations he had omitted to take into account or in what way and to what extent the Minister's decision was unreasonable;

(8) The Minister when exercising the discretion conferred upon him by s. 20(3) of the Act was performing an administrative as opposed to a quasi judicial function. He was therefore under no obligation to furnish reasons. His failure to give reasons for the decision reached does not entitle the Court to infer that he had no good reasons for taking the decision he did.

Senior Federal Counsel for the Minister also submitted that no mandamus could be raised against the Minister. Counsel for the appellant did not agree with this submission but Counsel conceded that a direction could be given to the Minister.

In responding to the appeals, Counsel for the respondent made the following submissions:

(1) The right to earn a livelihood is a fundamental right guaranteed by the Federal Constitution and is to be regarded as having proprietary value;

(2) Parliament, in order to remedy the defects at common law, has enacted a special legislation in the form of the Act and created a machinery to afford protection to a workman who has been dismissed without just cause or excuse. It is therefore incumbent upon the Minister who is invested with the power to refer disputes to the Industrial Court to act fairly and justly when exercising that power;

(3) On the material placed before him, a reasonable Minister similarly circumstanced as this Minister would have referred the respondent's complaint to the Industrial Court;

(4) A Court is entitled to undertake a critical examination of the facts of a particular complaint to determine whether the Minister's decision was reasonable. The correct legal approach is to determine whether the complaint when viewed against its factual background is frivolous or vexatious. If it is not, then the Minister must refer the dispute to the Industrial Court. On the facts of this case, the dispute was neither frivolous nor vexatious and the Minister's decision not to refer is therefore bad in law;

(5) By reason of the nature of the power vested in the Minister, if he fails to give reasons for his refusal to refer a disputes to the Industrial Court, it may be reasonably inferred that he had no valid reasons for the decision he made;

(6) The material that was made available to the learned Judge in the High Court was the same as that which was before the Minister. The fact that the domestic inquiry found the respondent guilty of misconduct is irrelevant;.

(7) The learned Judge was correct in issuing mandamus to the Minister requiring him to refer the dispute to the Industrial Court. Even if he was wrong in doing so, this Court may issue a direction to the Minister under para. 1 of the schedule to the Courts of Judicature Act 1964, requiring him to refer the dispute to the Industrial Court.

Held:

Per Gopal Sri Ram JCA:

[1] Section 20 of the Industrial Relations Act, relating to representations on dismissals, must receive an interpretation that will have the effect of advancing the purpose for which Parliament passed the Act. The Court should not in the process of determining the true nature and scope of s. 20, apply a rule of construction which will have the effect of thwarting the object which Parliament has entered the section. The section is obviously a remedial provision, housed in an Act that is itself a piece of beneficent social legislation. It should therefore receive a broad and liberal interpretation.

[2] The right of livelihood, quite apart from being a proprietary right, is one of the fundamental liberties guaranteed under Part II of the Federal Constitution. The expression "life" in Art. 5(1) of the Federal Constitution is wide enough to encompass the right of livelihood.

[3] The desire of Parliament to protect the nation's work force from the harshness of an unbending and inveterate common law and doctrines of equity, as expressed by the provisions of the Industrial Relations Act, may be seen to be entirely in harmony with the terms of the Federal Constitution - the Supreme Law of the Federation. The high standards of social justice so carefully established by the legislators and by the framers of the Federal Constitution ought not be consciously lowered by any decision of this Court.

[4] It is quite clear that s. 20(3) of the Industrial Relations Act gives the Minister a choice. He may either refer the representations to the Industrial Court or he may refuse to do so. When he settles upon the particular course that appeals to him he makes a decision. It is therefore not correct to say that the Minister when he exercised his discretion not to refer the respondent's complaint to the Industrial Court, did not take any decision in the legal sense, as argued by Counsel from the appellants and the Minister.

[5] The first question which the Minister ought to ask himself is whether the way in which he proposes to exercise his discretion will have the effect of preventing or settling the particular dispute; for that is what the Act is primarily aimed at. However this approach to the exercise of discretion is only a very general guide because a rigid adherence to it may result in every case being referred to the Industrial Court. But this is certainly not what Parliament intended as manifested by its conferment upon the Minister of a discretion whether to refer or not to refer a representation to the Industrial Court.

[6] The second question that the Minister must ask himself is whether, objectively speaking, the representations made under s. 20(1) of the Act are frivolous or vexatious. If they are then, he may well be justified in refusing a reference. Whether they are or are not depends upon the facts of each case.

[7] The Minister's decision, one way or the other, upon the question whether representations made under s. 20(1) of the Act are frivolous or vexatious is neither final nor conclusive and may be reopened in judicial review proceedings. A Court may upon an objective assessment of the facts and material before the Minister fairly came to the conclusion that the representation is or is not frivolous or vexatious and hence merits reference to the Industrial Court.

[8] When a question arises as to whether the Minister has correctly exercised his discretion under s. 20(3) of the Industrial Courts Act, it is the solemn duty of the Court to undertake a meticulous examination of the facts that are made available to the Minister. If the examination reveals that the representations made under s. 20(1) of the Act are neither perverse, frivolous nor vexatious, a decision not to refer is liable to be quashed by an order of certiorari.

[9] The Minister must bear in the forefront of his mind that the Industrial Courts Act has established a special tribunal to adjudicate upon a dispute arising from representations under s. 20(1) of the Act and it is therefore no part of his function to arrive at a concluded view upon the merits of the dispute. His role is limited to ascertaining whether upon the facts and material place before him, the representations raised serious questions of fact or law for adjudication. And his determination upon the question one way or another is not conclusive.

[10] The fact that an employer has conducted a domestic inquiry against his workman is an entirely irrelevant consideration to the issue whether the latter had been dismissed without just cause or excuse. The findings of

a domestic inquiry are not binding upon the Industrial Court which rehears the matter afresh. However the Industrial Court may take into account the fact that a domestic inquiry has been held when determining whether the particular workman was dismissed. These considerations also apply to the Minister when exercising his discretion under s. 20(3) of the Act.

[11] Parliament has created three separate and distinct powers in respect of the same subject-matter and conferred each of them upon separate authorities. First, there is the conciliatory power vested in the Director-General whose sole function is to mediate and attempt to settle disputes as early as possible. It is no part of his function to ascertain the law or the facts or to make any determination upon either. If his attempt to reconcile the parties fails he merely notifies the Minister of this fact. If he is found in any case to have done more than what the law permits, his action will be liable to be quashed on the ground that it is *ultra vires* the Act.

Second, there is power vested in the Minister to refer representations made under s. 20(1). It is a power he must, by reason of the combined operation of the provisions of Arts. 5(1) and 8(1) of the Federal Constitution, exercise fairly.

Third, there is the power to adjudicate upon the same representation vested in the Industrial Court which, by the terms of the Act, is enjoined to act, *inter alia,* according to equity and good conscience when making its award.

The way in which the Act is constructed makes it clear that it is only the Industrial Court which is conferred with an adjudicatory function. The two preceding powers, namely, the Director-General and the Minister cannot therefore assume a function expressly reserved to the third. It follows that *prima facie*, considerations that are irrelevant to the Industrial Court's decision-making process cannot be, and are not relevant, *vis-á-vis* the referring authority.

[12] The Minister when exercising his discretion to refer the matter to the Industrial Court ought not to be influenced by the fact that a domestic inquiry was held by the employer before dismissing his workman. Were it otherwise the guilt or innocence of a workman upon a charge of misconduct would be decided not by the Industrial Court but by the employer himself.

[13] As a general rule, procedural fairness, which includes the giving of reasons for decision, must be extended to all cases where a fundamental liberty as guaranteed by the Federal Constitution is adversely affected

in consequence of a decision taken by a public decision maker. In this case the Minister when refusing to refer representations in the exercise of his discretion under s. 20(3) of the Industrial Relations Act is reasonably expected to give reasons for his decision. This is because the decision he makes has an impact upon a fundamental right conferred by the Federal Constitution.

[14] The Minister may not be procedurally compelled to furnish his reasons. But if he gives no reasons or inadequate reasons, then it is open for a Court to conclude that he had no good reasons or inadequate reasons for making the decision he did. The reasons he gives are, of course, subject to curial scrutiny for the purpose of determining whether he had exercised his discretion in accordance with law.

[15] The power of the High Court in the field of public law remedies is not confined to the grant of the usual prerogative orders known to English law. Our Courts should not consider themselves fettered by those antiquated shackles of restrictive traditionalism which the common law of England has imposed upon itself. They are at liberty to develop a common law that is to govern the grant of public law remedies based upon our own legislation. They may of course be guided by the decisions of a jurisdiction which has an analogous provision. But ultimately they must hearken to the provisions of our own written law when determining the nature and scope of their powers.

[16] The wide power conferred by the language of para. 1 of Schedule to the Courts of Judicature Act enables our courts to adopt a fairly flexible approach when they came to decide upon the appropriate remedy that is to be granted in a particular case. They are at liberty to fashion the appropriate remedy to fit the factual matrix of a particular case and to grant such relief as meets the ends of justice.

[17] In this case the Minister had two alternatives open to him. He could either refer or decline to do so. He elected the latter course and exhausted so much of the power as relates to that choice. So all that left is the power to refer, which I am satisfied is amenable to mandamus. In the circumstances I am unable to accede to the submissions of Counsel directed against the order of mandamus by the learned Judge.

[18] The learned Judge was right in issuing certiorari and quashing the Minister's decision not to refer the respondent's representations to the Industrial Court. It was plain that the representations made by the respondent were neither perverse, frivolous or vexatious.

[19] It was submitted by the appellant and the Minister that the complaint of victimisation was never raised during the domestic inquiry but very much later. That submission goes to the right of the allegation and is not a matter for the Minister to decide. What weight ought to be assigned to the complaint is for the Industrial Court to determine.

[20] The appeals must therefore be dismissed and the orders made by the learned Judge confirmed.

Per Siti Norma Yaakob JCA:

[1] In the light of the Minister's omission to give reasons for his decision not to refer the matter to the Industrial Court, this Court, like the Court of first instance, can go into the merits of the respondent's complaint to see whether it is frivolous or vexatious and whether the Minister had acted fairly and reasonably in deciding as he did, provided that such consideration are limited to the materials that were before the Minister. However the Court at first instance and this Court cannot go beyond what had already been placed before the Minister for his consideration.

[2] As the Minister had not given any reasons for his decision, there is no knowing whether he had considered the defence of victimisation or that the Manual under which the two alleged offences were founded was not applicable to the respondent and that the high burden placed on the respondent before the domestic inquiry works unfairly towards him. The very fact that the Minister refused to refer points to the possibility that he had failed to consider these matters which another Minister, similarly circumstanced would have done and come to the inescapable conclusion that the respondent's complaint is not perverse, frivolous or vexatious.

[3] The Industrial Relations Act is a piece of social legislation by which disputes between employers and their workmen are to be speedily settled or resolved and when interpreting such an Act, the liberal approach is to be taken as opposed to the restrictive one. However when such a dispute cannot be settled amicably, Parliament has conferred on the Minister with the discretion to refer such dispute to the Industrial Court provided that the dispute is not frivolous or vexatious.

[4] On the facts of this case it cannot be said that the respondent's complaint is perverse, frivolous or vexatious as there are sufficient materials disclosed which ought to have influenced the Minister to refer the dispute to the Industrial Court. The fact that he did not militates against the object of the Act.

[5] Since both the 1980 Rules of the Supreme Court and the Specific Relief Act 1950 contain provisions for the issue of the order of mandamus it is open to the respondent to choose under which law he wishes to proceed. Since he has elected to apply for the order of mandamus, he is free to do so. Since the power to refer is amenable to mandamus, I see nothing objectionable to order given by the learned Judge that mandamus is to be issued directing the Minister to refer the respondent's dismissal to the Industrial Court for an award.

[Appeal dismissed]

*[**Bahasa Malaysia** Translation of Headnotes]*

UNDANG-UNDANG PENTADBIRAN: *Pelaksanaan kuasa-kuasa pentadbiran - Pemecatan daripada pekerjaan selepas siasatan domestik - Permohonan kepada Menteri untuk merujuk pertikaian kepada Mahkamah Perindustrian - Budibicara Menteri - Menteri enggan merujuk pertikaian kepada Mahkamah Perindustrian - Permohonan untuk mendapatkan perintah certiorari bagi membatalkan keputusan Menteri dan bagi mendapatkan mandamus bagi merujuk perkara kepada Mahkamah Perindustrian - Representasi oleh pekerja tidak menyalahi aturan, remeh dan menyusahkan - Kegagalan Menteri memberi alasan - Samada keputusan Menteri tertakluk kepada kajian semula kehakiman - Samada keputusan untuk tidak merujuk kepada Mahkamah Perindustrian boleh dibatalkan oleh certiorari - Samada Mahkamah boleh mengeluarkan mandamus bagi Menteri merujuk perkara kepada Mahkamah Perindustrian - Akta Perhubungan Perindustrian 1967, s. 20(3).*

UNDANG-UNDANG PENTADBIRAN: *Pelaksanaan kuasa-kuasa kehakiman - Bidangkuasa - Kuasa dianugerahkan oleh perenggan 1 Jadual kepada Akta Mahkamah Kehakiman ke atas Mahkamah Tinggi - Mahkamah tidak dibelenggu oleh English common law - Mahkamah bebas untuk membentuk remedi yang sewajarnya untuk disesuaikan dengan fakta dan butir-butir kes dan untuk memberikan relief yang memenuhi kehendak-kehendak keadilan - Mahkamah bebas untuk membentuk common law Malaysia.*

UNDANG-UNDANG PERLEMBAGAAN: *Kebebasan asasi - Kebebasan seseorang - Peruntukan dalam Perlembagaan Persekutuan bahawa seseorang tidak akan diambil nyawanya melainkan menurut undang-undang - Ungkapan "life" cukup luas untuk merangkumi hak kepada mata pencarian - Perkara 5(1) Perlembagaan Persekutuan.*

TAFSIRAN BERKANUN: *Pentafsiran statut - Akta Perhubungan Perindustrian adalah suatu perundangan sosial yang bermanafaat - Harus diberi tafsiran yang luas dan liberal - Standard tinggi keadilan sosial yang ditetapkan oleh pembuat Perlembagaan Persekutuan dan oleh badan perundangan bila memperbuat Akta Perhubungan Perindustrian - Tidak seharusnya dengan sengaja direndahkan oleh keputusan Mahkamah.*

UNDANG-UNDANG BURUH: *Pekerjaan - Pemecatan - Pemecatan pekerja selepas siasatan domestik - Permohonan kepada Menteri untuk merujuk perkara kepada Mahkamah Perindustrian - Permohonan ditolak oleh Menteri - Tiada alasan diberikan - Permohonan untuk certiorari dan mandamus - Pengemukaan oleh pekerja tidak bertentangan, remeh atau menyusahkan - Permohonan dibenarkan - Akta Perhubungan Perindustrian 1967, s. 20(3).*

Responden dalam kes ini yang telah dilantik sebagai pengurus besar bagi syarikat perayu telah terus dipecat kerana didakwa salah-laku pada 22 Februari 1990. Alasan syarikat plaintif adalah bahawa beliau telah secara aktif mengambil bahagian dalam perundingan untuk membeli sebidang tanah yang telah dibeli oleh sebuah syarikat dalam lingkungan Hong Leong Group ketika abangnya merupakan broker, dan bahawa beliau telah gagal untuk memaklumkan kepada syarikat mengenai peranan beliau dalam perundingan itu dan juga mengenai kepentingan abangnya dalam transaksi tanah itu. Syarikat perayu telah mengirimkan surat kepada responden meminta beliau menjelaskan kelakuannya dan peranannya di dalam perundingan itu. Kemudiannya syarikat perayu telah mengirimkan satu surat yang lain kepada responden mendakwa bahawa beliau telah diambil bekerja atau telah melantik dirinya sendiri dalam suatu perniagaan lain kepunyaan sebuah syarikat yang lain. Responden telah menjawab surat-surat ini dan kemudiannya perayu telah menjalankan suatu siasatan domestik terhadap responden. Tiga tuduhan telah secara khususnya dikemukakan kepada responden. Beliau telah menafikan kesemua tuduhan-tuduhan itu dan telah memberikan penjelasan lisan bagi setiap satu tuduhan. Perayu kemudiannya memaklumkan responden melalui surat bahawa beliau telah dipecat daripada perkhidmatan berkuatkuasa dengan serta merta. Selepas pemecatannya responden telah membuat aduan dengan Ketua Pendaftar Perhubungan Perindustrian di bawah s. 20(1) Akta Perhubungan Perindustrian 1967. Suatu mesyuarat pendamaian telah diadakan oleh pejabat Pengarah Perhubungan Perindustrian tetapi ianya tidak berkesudahan kerana pihak-pihak tersebut tidak dapat mencapai penyelesaian secara berbaik-baik. Responden kemudiannya telah menulis kepada Timbalan Pengarah mendakwa bahawa beliau telah dengan cara yang tidak wajar dipecat kerana tindakan dendam oleh Pengarah Urusan Kumpulan Hong Leong dan meminta supaya perkara beliau ini dirujukkan kepada Mahkamah Perindustrian.

Ketua Pengarah Perhubungan Perindustrian selepas itu telah melaporkan kepada Menteri bahawa pengemukaan yang dibuat oleh responden tidak dapat diselesaikan. Menteri tersebut setelah menimbangkan laporan Ketua Pengarah dan bertindak atas kekuatan bahan yang disediakan untuk Ketua Pengarah, membuat kesimpulan bahawa pengemukaan responden tidak seharusnya dirujuk kepada Mahkamah Perindustrian untuk adjudikasi. Keputusan ini telah disampaikan kepada responden dan responden telah membuat satu permohonan untuk certiorari bagi membatalkan keputusan Menteri dan bagi mendapatkan perintah mandamus bagi memaksa Menteri untuk merujuk pertikaian itu kepada Mahkamah Perindustrian. Perayu kemudiannya telah memohon untuk disertakan sebagai satu pihak kepada prosiding tersebut dan perkara ini telah dibenarkan. Dalam Mahkamah Tinggi Hakim yang bijaksana telah memberikan relief yang dipohon. Perayu dan Menteri tersebut kemudiannya telah membuat rayuan kepada Mahkamah Rayuan.

Penghujahan Peguam-Peguam bagi pihak perayu dan bagi pihak Menteri boleh diringkaskan seperti berikut:

(1) Seksyen 20(3) Akta tersebut meletakkan budibicara ke atas Menteri sama ada merujuk atau tidak merujuk kepada Mahkamah Perindustrian, pengemukaan-pengemukaan yang dibuat di bawah s. 20(1) Akta tersebut. Apabila beliau melaksanakan budibicaranya untuk tidak merujukkan aduan responden kepada Mahkamah Perindustrian, beliau telah tidak mengambil apa-apa tindakan menurut undang-undang.

(2) Persoalan sama ada pertikaian itu wajar mendapat rujukan adalah untuk diputuskan oleh Menteri. Jika laporan Ketua Pengarah mendedahkan satu pertikaian yang melibatkan isu-isu fakta yang serius atau undang-undang, maka Menteri seharusnya merujuk pertikaian itu kepada Mahkamah Perindustrian. Walaubagaimanapun, berhubung dengan kes semasa ini, tidak terdapat isu-isu yang sedemikian, oleh itu Menteri boleh dikatakan betul dalam tidak merujukkan pertikaian itu;

(3) Berikutan dengan penghujahan (2), dalam kes ini terdapat faktor tambahan yang memihak kepada perlaksaan budibicara oleh Menteri terhadap respondent. Siasatan domestik yang dijalankan oleh perayu mendapati responden bersalah atas salah laku yang didakwa terhadapnya. Sebahgian daripada fakta-fakta dan penegasan-penegasan yang dibangkitkan di Mahkamah Tinggi tidak pernah disebut oleh responden ketika siasatan domestik tersebut. Bahan-bahan yang terdapat di hadapan Menteri adalah dengan itu agak berlainan daripada yang kemudiannya dikemukakan di hadapan Hakim yang bijaksana;

(4) Budibicara Menteri adalah tertakluk kepada kajian semula kehakiman, tetapi hanya jika beliau telah tersalah tafsir peruntukan berkanun di bawah yang mana beliau telah bertindak atau mengambil perhatian pertimbangan-pertimbangan yang tak relevan atau gagal untuk mengambil kira pertimbangan-pertimbangan yang relevan atau telah menanyakan dirinya soalan yang salah atau mencapai keputusan yang tak rasional. Dalam ertikata yang lain, perlaksanaan budibicara Menteri adalah selamat daripada kajian semua kehakiman jika beliau tidak melakukan apa yang dikatakan "Anisminis error" dalam *Syarikat Kenderaan Melayu Kelantan Bhd. v. Transport Workers' Union* [1995] 2 CLJ 748; [1995] 2 MLJ 317, 342, atau keputusan beliau tidak terjejas oleh apa yang dikenali sebagai "Wednesbury unreasonableness";

(5) Mahkamah tidak berhak untuk meneliti fakta-fakta sesuatu kes bagi tujuan memutuskan sama ada Menteri telah melaksanakan budibicaranya menurut undang-undang kerana ini akan membawa kepada perlaksanaan bidangkuasa rayuan dan dengan itu melanggari prinsip-prinsip yang menguasai kajian semula kehakiman. Hakim yang bijaksana dalam Mahkamah di bawah telah pada hakikatnya menjalankan pemeriksaan yang sedemikian dan dengan itu telah melebihi lingkungan yang dibenarkan;

(6) Walaupun suatu penelitian akan faktual matrix dibenarkan, terdapat, dalam kes ini, bahan-bahan yang secukupnya di hadapan Menteri bagi mewajarkan keputusan beliau dan mana-mana Menteri yang berada dalam keadaan yang serupa dengan Menteri ini akan mencapai keputusan tersebut;

(7) Hakim yang bijaksana apabila membatalkan keputusan Menteri untuk tidak merujuk, tidak mengenalpasti pertimbangan-pertimbangan tak relevan yang diambilkira oleh Menteri atau pertimbangan-pertimbangan relevan yang beliau telah tertinggal untuk mengambilkira, atau bagaimana atau setakat manakah keputusan Menteri tersebut tidak wajar.

(8) Menteri ketika melaksanakan budibicara yang diletakkan ke atas beliau oleh s. 20(3) Akta tersebut adalah melaksanakan suatu tugas pentadbiran bertentangan dengan tugas kuasi kehakiman. Beliau dengan itu tidak berkewajipan untuk memberikan alasan-alasan. Kegagalan beliau memberikan alasan-alasan bagi keputusan yang telah beliau capai tidak memberikan hak kepada Mahkamah untuk menganggap bahawa beliau tidak mempunyai alasan yang baik bagi mengambil keputusan yang telah dilakukannya.

Peguam Kanan Persekutuan bagi pihak Menteri juga berhujah bahawa tiada mandamus yang dapat dibangkitkan terhadap Menteri. Peguam bagi pihak perayu tidak bersetuju dengan penghujahan ini tetapi Peguam menyetujui bahawa satu arahan boleh diberikan kepada Menteri.

Bagi menjawab rayuan-rayuan itu Peguam bagi pihak responden telah membuat penghujahan yang berikut:

(1) Hak untuk mendapatkan mata pencarian adalah suatu hak yang penting yang dijamin oleh Perlembagaan Persekutuan dan hendaklah dianggap sebagai mempunyai nilai proprietary.

(2) Parlimen, untuk meremedi kecacatan yang terdapat pada common law, telah menggubal satu perundangan khas dalam bentuk Akta dan telah mewujudkan suatu jentera bagi memberikan perlindungan kepada seseorang pekerja yang telah dipecat tanpa alasan atau sebab yang adil. Ianya dengan itu wajib atas Menteri tersebut yang telah diberi kuasa untuk merujuk pertikaian kepada Mahkamah Perindustrian untuk bertindak secara adil dan saksama ketika melaksanakan kuasa itu.

(3) Berhubung dengan bahan-bahan yang terdapat di hadapannya, seorang Menteri yang berada dalam keadaan yang sama seperti Menteri tersebut tentunya telah merujuk aduan responden kepada Mahkamah Perindustrian;

(4) Sesebuah Mahkamah berhak untuk melakukan suatu pemeriksaan yang kritikal akan fakta-fakta sebuah aduan yang tertentu bagi menentukan samada keputusan keputusan Menteri tersebut wajar. Pendekatan undang-undang yang betul adalah untuk menentukan sama ada aduan tersebut apabila dilihat menurut latarbelakang faktualnya adalah remeh atau menyusahkan. Jika ianya tidak, maka Menteri mestilah merujukkan pertikaian itu kepada Mahkamah Perindustrian. Menurut fakta kes ini, pertikaian itu bukannya remeh mahupun menyusahkan dan keputusan Menteri untuk tidak merujuk adalah dengan itu salah di sisi undang-undang.

(5) Berdasarkan sifat kuasa yang diletakhak pada Menteri, jika beliau gagal untuk memberikan alasanalasan bagi keengganannya untuk merujuk sesuatu pertikaian kepada Mahkamah Perindustrian, ianya boleh disimpulkan bahawa beliau tidak mempunyai alasan-alasan yang sah bagi keputusan yang telah beliau buat itu;

(6) Bahan-bahan yang disediakan di hadapan Hakim yang bijaksana dalam Mahkamah Tinggi adalah sama seperti yang terdapat di hadapan Menteri. Fakta bahawa siasatan domestik telah mendapati responden bersalah atas salah-laku adalah tak relevan;

(7) Hakim yang bijaksana adalah betul dalam mengeluarkan mandanus kepada Menteri yang menghendakinya merujuk pertikaian itu kepada Mahkamah Perindustrian. Kalaupun beliau salah dalam berbuat sedemikian, Mahkamah ini boleh mengeluarkan satu arahan kepada Menteri di bawah perenggan 1 jadual kepada Akta Mahkamah Kehakiman 1964, yang menghendaki beliau merujuk pertikaian itu kepada Mahkamah Perindustrian.

Diputuskan:

Oleh Gopal Sri Ram HMR:

[1] Seksyen 20 Akta Perhubungan Perindustrian, berhubung dengan pengemukaan-pengemukaan mengenai pemecatan, mestilah menerima tafsiran yang akan mempunyai kesan mengemukakan tujuan bagi yang mana Parlimen telah meluluskan Akta. Mahkamah tidak seharusnya dalam proses menentukan sifat sebenar dan bidang s.20, memakai kaedah pembentukan yang mana akan mempunyai kesan menghalang objek yang mana Parlimen telah memasukkan seksyen itu. Seksyen itu jelas merupakan satu peruntukan yang bersifat remedi, terletak dalam sesuatu Akta yang mana adalah dengan sendirinya merupakan satu perundangan sosial yang benefisial. Ianya dengan itu haruslah menerima tafsiran yang luas dan liberal.

[2] Hak mendapatkan mata pencarian, selain daripada menjadi hak utama, adalah salah satu kebebasan penting yang dijamin di bawah Bahagian II Perlembagaan Persekutuan. Ungkapan "life" dalam Per.5(1) Perlembagaan Persekutuan adalah cukup luas untuk merangkumi hak mendapatkan mata pencarian.

[3] Keinginan Parlimen untuk melindungi tenaga kerja negara daripada kekerasan Common Law dan doktrin ekuiti, sepertimana yang dinyatakan oleh peruntukan-peruntukan Akta Perhubungan Perindustrian, boleh dilihat sebagai berharmoni keseluruhannya dengan terma-terma Perlembagaan Persekutuan - Undang-undang Agung bagi Persekutuan. Standard keadilan sosial yang begitu tinggi yang ditetapkan dengan hematnya oleh penggubal-penggubal dan oleh pembuat-pembuat Perlembagaan Persekutuan tidak seharusnya secara sedar direndahkan oleh mana-mana keputusan Mahkamah ini.

[4] Ianya jelas bahawa s. 20(3) Akta Perhubungan Perindustrian memberikan Menteri tersebut satu pilihan. Beliau boleh sama ada merujuk pengemukaan-pengemukaan itu kepada Mahkamah Perindustrian atau beliau boleh menolak untuk berbuat sedemikian. Apabila beliau membuat pilihan jalan tertentu yang bersesuaian dengannya, beliau adalah membuat keputusan. Ianya dengan itu tidak wajar bagi menyatakan bahawa Menteri itu apabila beliau melaksanakan budibicaranya untuk tidak merujuk aduan reponden kepada Mahkamah Perindustrian, tidak membuat keputusan menurut undang-undang, sepertimana yang dihujahkan oleh Peguam bagi pihak perayu dan Menteri.

[5] Soalan pertama yang Menteri harus tanya dirinya sendiri adalah sama ada cara bagaimana beliau bercadang untuk melaksanakan budibicaranya akan mempunyai kesan mencegah atau menyelesaikan pertikaian yang tertentu, kerana itulah yang manjadi sasaran Akta secara pentingnya.

Walaubagaimanapun, pendekatan perlaksanaan budibicara adalah hanya satu garipanduan yang umum kerana pematuhan yang tegas terhadapnya akan menyebabkan setiap satu kes dirujuk kepada Mahkamah Perindustrian. Tetapi ini sama sekali bukan yang diniatkan Parlimen sepertimana yang dinyatakan oleh penganugerahannya ke atas Menteri akan budibicara sama ada untuk merujuk atau pun tidak sesuatu pengemukaan kepada Mahkamah Perindustrian.

[6] Persoalan kedua yang harus ditanya oleh Menteri tersebut kepada dirinya adalah samada, secara objektifnya, pengemukaan-pengemukaan yang dibuat di bawah s. 20(l) Akta tersebut adalah remeh atau menyusahkan. Jika ianya sedemikian rupa maka adalah wajar bagi beliau untuk enggan membuat suatu rujukan. Samada ianya sedemikian atau pun sebaliknya bergantung pada fakta-fakta setiap kes.

[7] Keputusan Menteri, dalam satu cara atau yang lain, di atas persoalan samada pengemukaan-pengemukaan yang dibuat di bawah s. 20(l) Akta tersebut adalah remeh atau menyusahkan adalah tidak muktamad dan boleh dibuka semula dalam prosiding-prosiding kajian semula kehakiman. Sesebuah Mahkamah boleh di atas satu penilaian objektif akan fakta-fakta dan bahan-bahan di hadapan Menteri mencapai keputusan secara adilnya bahawa pengemukaan tersebut adalah remeh atau menyusahkan, atau pun mencapai keputusan sebaliknya dan dengan itu membenarkan rujukan kepada Mahkamah Perindustrian.

[8] Apabila sesuatu persoalan berbangkit sama ada Menteri tersebut telah dengan cara yang betul melaksanakan budibicaranya di bawah s. 20(3) Akta Mahkamah Perindustrian, ianya merupakan kewajipan Mahkamah untuk melakukan satu pemeriksaan yang teliti akan fakta-fakta yang dikemukakan di hadapan Menteri. Jika pemeriksaan itu mendedahkan bahawa pengemukaan-pengemukaan yang dibuat di bawah s. 20(l) Akta tersebut adalah bertentangan, remeh atau menyusahkan, suatu keputusan untuk tidak merujuk adalah boleh dibatalkan melalui satu perintah *certiorari*.

[9] Menteri mestilah sedar bahawa Akta Mahkamah Perindustrian telah menetapkan satu tribunal khas untuk mengadjudikasikan sesuatu pertikaian yang berbangkit daripada pengemukaan-pengemukaan di bawah s. 20(1) Akta tersebut dan ianya dengan itu tidak merupakan sebahagian daripada fungsinya untuk mencapai pendapat yang muktamad atas merit pertikaian tersebut. Peranannya adalah terhad kepada memastikan sama ada berdasarkan fakta-fakta dan bahan yang terletak di hadapan beliau, pengemukaan-pengemukaan tersebut telah membangkitkan persoalan-persoalan fakta atau undang-undang yang serius untuk diadjudikasikan. Dan penentuannya di atas persoalan itu dengan satu cara atau yang lain adalah tidak muktamad.

[10] Hakikat bahawa majikan telah melakukan siasatan domestik ke atas pekerjanya adalah suatu pertimbangan yang sesungguhnya tak relevan kepada isu sama ada pihak yang terkemudian telah dipecat tanpa alasan atau sebab yang adil. Keputusan hasil daripada siasatan domestik tersebut adalah tidak mengikat Mahkamah Perindustrian yang mendengar-semula perkara-perkara tersebut. Walaubagaimana pun Mahkamah Perindustrian boleh mengambil kira hakikat bahawa siasatan domestik telah diadakan ketika menentukan sama ada pekerja yang khusus itu telah diberhentikan. Pertimbangan-pertimbangan ini juga terpakai kepada Menteri ketika melaksanakan budibicaranya di bawah s. 20(3) Akta.

[11] Parlimen telah mewujudkan tiga kuasa berasingan dan berbeza berhubung dengan hal-perkara yang sama dan meletakkan setiap satu daripadanya ke atas pihak-pihak berkuasa yang berasingan. Pertamanya, terdapat kuasakuasa pendamaian yang diletakhak pada Ketua Pengarah yang satu-satu fungsinya adalah untuk menjadi pengantara dan cuba untuk menyelesaikan pertikaian secepat yang mungkin. Ianya tidak merupakan fungisnya untuk menentukan undang-undang atau fakta-fakta tersebut ataupun untuk membuat apa-apa penentuan atas mana-mana satu. Jika percubaan nya untuk mendamaikan pihak-pihak tersebut gagal beliau hanya perlu memberitahu Menteri akan fakta ini. Jika beliau didapati dalam apa-apa keadaan telah melakukan lebih daripada apa yang dibenarkan oleh undang-undang, tindakannya boleh dibatalkan atas alasan bahawa ianya *ultra vires* Akta.

Keduanya, terdapat kuasa yang telah diletakhak ke atas Menteri untuk merujuk pengemukaan-pengemukaan yang dibuat di bawah s. 20(1). Ianya adalah suatu kuasa yang beliau mesti, disebabkan oleh operasi bersama akan peruntukan-peruntukan Per. 5(1) dan 8(1) Perlembagaan Persekutuan, laksanakan secara adil.

Ketiga, terdapat kausa untuk mengadjudikasikan pengemukaan yang sama yang telah diletakhak ke atas Mahkamah Perindustrian yang mana, menurut terma-terma Akta, adalah dikehendakki bertindak, antara lainnya, menurut ekuiti dan niat yang baik ketika membuat awardnya.

Cara dalam mana Akta tersebut dibentuk menjadikannya jelas bahawa adalah hanya Mahkamah Perindustrian yang telah dianugerahkan dengan fungsi adjudikasi. Keduadua kuasa terdahulu, iaitu Ketua Pengarah dan Menteri tersebut dengan itu tidak boleh mengambil fungsi yang secara nyatanya dikhaskan bagi yang ketiga. Adalah didapati bahawa *prima facie*, pertimbangan-pertimbangan yang tak relevan kepada proses membuat keputusan Mahkamah Perindustrian tidak mungkin boleh menjadi relevan, dan adalah tak relevan kepada pihak berkuasa yang merujuk.

[12] Menteri, apabila melaksanakan budibicaranya untuk merujuk halperkara kepada Mahkamah Perindustrian, tidak seharusnya dipengaruhi oleh hakikat bahawa satu siasatan domestik telah diadakan oleh majikan sebelum memecat pekerjanya. Jika ianya sebaliknya, kesalahan atau ketakbersalahan seseorang pekerja atas tuduhan salah laku akan ditentukan bukan oleh Mahkamah Perindustrian tetapi oleh majikanya sendiri.

[13] Sebagai kaedah am, keadilan prosedur, yang mana termasuk memberikan alasan-alasan bagi keputusan, mestilah dilanjutkan kepada kesemua kes-kes di mana kebebasan asasi yang dijamin oleh Perlembagaan Persekutuan menjadi terjejas akibat satu keputusan yang dibuat oleh pembuat keputusan awam. Dalam kes ini, Menteri apabila enggan untuk merujuk pengemukaan-pengemukaan dalam melaksanakan budibicaranya di bawah s. 20(3) Akta Perhubungan Perindustrian sewajarnya memberi alasan bagi keputusannya. Ini adalah kerana keputusan yang dibuat olehnya mempunyai kesan ke atas hak asasi yang dianugerahkan oleh Perlembagaan Persekutuan.

[14] Menteri mungkin di segi prosedur tidak dipaksa untuk memberikan alasannya. Tetapi jika beliau tidak memberi alasan atau memberi alasan yang tidak mencukupi, maka ianya akan terbuka bagi Mahkamah untuk memutuskan bahawa beliau tidak mempunyai alasan yang baik atau yang mencukupi untuk membuat keputusan sebagaimana yang telah dilakukan oleh beliau. Alasan-alasan yang beliau berikan adalah tertakluk kepada penelitian bagi menentukan samada beliau telah melaksanakan budibicaranya menurut kehendak undang-undang.

[15] Kuasa Mahkamah Tinggi dalam bidang remedi undang-undang awam adalah tidak terhad kepada pemberian perintah-perintah prerogatif yang diketahui oleh undang-undang Inggeris. Mahkamah-mahkamah kita tidak seharusnya anggap diri mereka terbelenggu oleh kongkongan tradisionalisme yang sudah lapuk yang mana common law Inggeris telah mengenakan ke atas dirinya. Mereka mempunyai kebebasan untuk membina suatu common law berhubung pemberian remedi undang-undang awam berdasarkan perundangan kita sendiri. Memanglah keputusan sesuatu bidangkuasa yang mempunyai peruntukan yang seakan-akan serupa boleh membimbing. Tetapi, pada akhirnya, mereka mestilah mematuhi peruntukan undang-undang bertulis kita sendiri ketika mementukan sifat dan bidang kuasa-kuasa mereka.

[16] Kuasa luas yang dianugerahkan oleh perenggan 1 jadual Akta Mahkamah Kehakiman membolehkan Mahkamah kita menerima-pakai pendekatan yang fleksibel apabila mereka memutuskan remedi wajar yang perlu diberikan dalam sesuatu kes yang khusus. Mereka mempunyai kebebasan

untuk membentuk remedi yang wajar untuk menyesuaikan factual matric sesuatu kes yang khusus dan untuk memberikan relief yang sedemikian dengan cara yang memenuhi kehendak keadilan.

[17] Dalam kes ini, Menteri mempunyai dua alternatif yang terbuka padanya. Beliau boleh merujuk atau enggan untuk melakukan sedemikian. Beliau telah memilih jalan yang terkemudian dan menghabiskan sebegitu banyak daripada kuasa berhubung dengan pilihan itu. Oleh itu apa yang tinggal hanyalah kuasa untuk merujuk, yang mana saya berpuashati boleh tertakluk kepada mandamus. Dalam keadaan yang sedemikian, saya tidak dapat bersetuju dengan hujah menentang Peguam yang ditujukan terhadap perintah mandamus oleh Hakim Yang bijaksana.

[18] Hakim Yang bijaksana betul dalam mengeluarkan certiorari dan membatalkan keputusan Menteri untuk tidak merujukkan pengemukaan-pengemukaan responden kepada Mahkamah Perindustrian. Ianya jelas bahawa pengemukaan-pengemukaan yang telah dibuat oleh responden adalah tidak bertentangan, remeh atau menyusahkan.

[19] Telah dihujahkan oleh perayu dan Menteri bahawa aduan mengenai pemangsaan tidak pernah dibangkitkan ketika siasatan domestik tetapi agak lama kemudiannya. Penghujahan itu menunjukkan hak pengataan dan bukannya suatu perkara untuk diputuskan oleh Menteri. Apakah penekanan yang harus diletakkan pada aduan tersebut harus ditentukan oleh Mahkamah Perindustrian.

[20] Rayuan-rayuan di sini dengan itu haruslah ditolak dan perintah-perintah yang dibuat oleh Hakim yang bijaksana disahkan.

Oleh Siti Norma Yaakob HMR:

[1] Memandangkan peninggalan oleh Menteri untuk memberikan alasan-alasan bagi keputusannya untuk tidak merujukkan perkara itu kepada Mahkamah Perindustrian, Mahkamah ini, seperti juga Mahkamah yang mula, boleh melihat merit-merit aduan responden bagi mengetahui sama ada ianya remeh atau menyusahkan dan sama ada Menteri telah bertindak secara adilnya dan dengan wajarnya dalam membuat keputusan sebagaimana yang telah dilakukan oleh beliau, dengan syarat bahawa pertimbangan yang sedemikian adalah terhad kepada bahan-bahan yuang terdapat di hadapan Menteri tersebut. Walau bagaimanapun Mahkamah yang pertama dan Mahkamah ini tidak boleh melampaui apa yang telah pun dikemukakan di hadapan Menteri tersebut untuk dipertimbangkan oleh beliau.

[2] Oleh kerana Menteri telah tidak memberikan apa-apa alasan bagi keputusannya, tidak terdapat apa-apa pengetahuan sama ada beliau telah mempertimbangkan pembelaan pemangsaan atau bahawa Manual di bawah mana kedua-dua kesalahan yang dikatakan itu telah diasaskan, adalah tidak terpakai kepada responden dan bahawa bebanan sebegitu tinggi yang diletakkan ke atas responden sebelum siasatan domestik memberi kesan buruk kepadanya. Hakikat bahawa Menteri telah enggan untuk merujuk menunjuk kepada kemungkinan bahawa beliau telah gagal untuk mempertimbangkan perkara-perkara yang mana seorang Menteri yang lain, yang berada dalam keadaan yang serupa, mungkin telah mencapai keputusan yang tidak boleh dielakkan lagi bahawa aduan responden adalah tidak bertentangan, tidak remeh atau tidak menyusahkan.

[3] Akta Perhubungan Perindustrian adalah suatu perundangan sosial melalui yang mana pertikaian antara majikan dan pekerja-pekerja mereka boleh diselesaikan dengan cepat dan apabila mentafsirkan Akta yang sedemikian, pendekatan yang liberal hendaklah diambil bertentangan dengan pendekatan yang terhad. Namun begitu apabila pertikaian yang sedemikian tidak dapat diselesaikan dengan secara damai, Parlimen telah meletakkan ke atas Menteri budibicara untuk merujukkan pertikaian yang sedemikian kepada Mahkamah Perindustrian dengan syarat pertikaian itu tidak remeh atau meyusahkan.

[4] Berdasarkan fakta-fakta kes ini, ianya tidak boleh dikatakan bahawa aduan responden itu adalah bertentangan, remeh atau menyusahkan kerana terdapat bahan-bahan mencukupi yang telah didedahkan yang mana seharusnya telah mempengaruhi Menteri untuk merujukkan pertikaian itu kepada Mahkamah Perindustrian. Hakikat bahawa beliau tidak merujukkan pertikaian itu kepada Mahkamah Perindustrian menyekat akan tujuan Akta itu.

[5] Oleh kerana kedua-dua Kaedah-Kaedah Mahkamah Agung 1980 dan Akta Relief Spesifik 1950 mengandungi peruntukan-peruntukan untuk mengeluarkan mandamus maka ianya terbuka kepada responden untuk memilih di bawah undang-undang yang manakah beliau ingin meneruskan tindakannya. Oleh kerana beliau telah memilih untuk memohon bagi mendapatkan perintah mandamus, beliau adalah bebas untuk melakukan sedemikian. Oleh kerana kuasa untuk merujuk adalah boleh tertakluk kepada mandamus, saya tidak dapat melihat apa-apa yang tidak kena dengan perintah yang diberikan oleh Hakim yang bijaksana bahawa mandamus hendaklah dikeluarkan mengarah Menteri supaya merujuk pemecatan responden kepada Mahkamah Perindustrian untuk mendapatkan satu award.

[Rayuan ditolak]

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Attorney-General of Hong Kong v. Zauyah Wan Chik & Ors. [1995] 3 CLJ 35
Cheow Siong Chin v. Menteri Dalam Negeri, Malaysia & 2 Ors. [1985] 1 CLJ 229
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Variety Emporium v. Mohd Ibrahim AIR [1985] SC 207
Doody v. Secretary of State for the Home Department and Other Appeals [1993] 3 All ER 92
Regina v. Secretary of State for Trade and Industry, ex parte Lonrho Plc [1989] 1 WLR 525
National Union of Hotel, Bar and Restaurant Workers v. Minister of Labour and Manpower [1980] 2 MLJ 189
Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia [1996] 4 CLJ 687

Legislation referred to:
Court of Judicature Act 1964
Criminal Procedure Code, s. 365
Federal Constitution, Arts. 5(1), 8(1), 125(3A)
Industrial Relations Act 1967, ss. 20(1), (3), 26(2)
Land Acquisition Act 1960
Rules of the High Court 1980, O. 53 rr. 1(1), (2), 2(1), O. 54
Rules of the Court of Appeal 1995
Specific Relief Act 1950, ss. 44, 45, 49
University & University Colleges Act 1971, s. 6
Constitution of India, Art. 226(1)
Supreme Court Act 1981 [UK]

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Judicial Review of Administrative Action, De Smith, Woolf and Jowell, 5th Edn., p. 457
Rukun Keadilan/Principles of Justice, Azmi LP, [1971] 2 MLJ xliii

[Appeal from High Court, Kuala Lumpur; Originating Motion No: R2-25 135-90]

Civil Appeal No: 04-19-94
For the appellant - Sivabalah; M/s. Shearn Delamore & Co.
For the respondent - V.K. Lingham (W. Satchithanandham & Subashini Muniandy with him); M/s. V.K. Lingham & Co.

Civil Appeal No: 01-21-94
For the appellant - Haliza Aini Othman; Senior Federal Counsel
For the respondent - V.K. Lingham (W. Satchithanandham & Subashini Muniandy with him); M/s. V.K. Lingham & Co.

JUDGMENT

Gopal Sri Ram JCA:

Introduction

There are two appeals before this Court. Both appeals are directed against the same decision of the High Court. The first is by Hong Leong Equipment Sdn. Bhd. For convenience I will refer to it as the appellant. The second is by the Minister of Labour and Manpower whom I shall simply refer to as 'the Minister'. I must first say a few words about how both these appeals came to be heard together.

When we commenced this session on 4 December 1995, we had only the appellant's appeal before us. We were unaware of the Minister's appeal at that time. However, when Encik Sivabalah commenced his submissions on behalf of the appellant, he informed us of it, but went on to say that he was given to understand that the Minister's appeal had been withdrawn and disposed of for failure to lodge the record of appeal within the time limited by the Court of Appeal Rules 1995. He said that those having conduct of the matter on behalf of the Minister were aware that the appellant's appeal had been scheduled for hearing during the present sitting of this Court and that he had been informed that Counsel having conduct of the matter on the Minister's behalf would be present at the hearing. However, when the appeal was called on, Counsel representing the Minister was absent.

In the event, we proceeded to hear the appellant's appeal. It was heard on 5 and 6 December 1995. After he had concluded his submissions on 6 December, Dato' V.K. Lingham of Counsel for the respondent quite properly informed us that he had discovered from the Registrar of the Court that the Minister's appeal had been neither withdrawn nor disposed of and that it was very much alive. Only the record of appeal was not on file.

I must, in this instance, express my thanks to Encik Zainal, the Registrar in attendance, for his valuable assistance in bringing the relevant status of the Minister's appeal to our attention. But for his timely intervention, I fear that a grave injustice may have been done to the Minister. For we would have proceeded on the erroneous basis that the Minister's appeal was at an end. Although Encik Zainal had requested learned Senior Federal Counsel to attend before us, no one representing the Minister appeared on 6 December.

On learning that the Minister's appeal was intact, we directed learned Senior Federal Counsel having conduct of the brief on the Minister's behalf to appear before us the following day. Further hearing of the appellant's appeal was

adjourned until we had heard from learned Senior Federal Counsel. We also requested the Registrar to inform learned Senior Federal Counsel concerned that we were prepared to entertain an application made on short notice for an extension of time for the Minister to deliver his memorandum of appeal. Dato' Lingham, with his usual courtesy, informed us that he would not oppose such an application.

When this Court convened on 7 December, Cik Haliza Aini Othman, learned Senior Federal Counsel having conduct of the matter on the Minister's behalf appeared. There was placed before us a motion to extend time for the filing of the Minister's memorandum of appeal. Being unopposed, we extended time in favour of the Minister. So that our order would not produce any unwarranted delay in the due prosecution of the appeals, we gave the following directions:

(1) that the Minister shall deliver his memorandum of appeal on or before Monday, 11 December 1995;

(2) that the record filed and delivered by the appellant do stand as the record in the Minister's appeal; and

(3) that all costs occasioned by the Minister's application be reserved and be dealt with upon disposal of the appeals.

Both appeals were then adjourned to 11 December 1995, when we heard arguments from Cik Haliza Aini in support of the Minister's appeal, Encik Sivabalah's final address on the appellant's appeal and Dato' V.K. Lingham's response. Judgment was thereafter reserved.

The Facts

The Hong Leong Group ('the Group') comprises several companies which are involved in numerous areas of economic activity in this country. The Group is primarily involved in finance and property development. But it has other interests as well. One of these is the marketing of motor cycles of the Yamaha brand. There is a company within the Group that deals exclusively with this activity. It is called Hong Leong Yamaha Distributors Sdn. Bhd. I will refer to it simply as "HLYD".

On 1 July 1977, the respondent commenced working for the Group. He was initially employed by HLYD and was given the designation "Director/General Manager". Later, he was transferred to the appellant which is another company in the Group and, in 1987, was appointed as its general manager. On 22 February 1990, in consequence of certain events to which I shall advert in a moment, the respondent was summarily dismissed for alleged misconduct. This is how it happened.

In 1983, HLYD was looking to acquire some land for its own use. The appellant's brother (not an employee of the Group) came across a piece of property in Petaling Jaya which may have suited the needs of HLYD. He brought it to the respondent's attention. The respondent then introduced this piece of property to the board of HLYD. They were keen on acquiring it for the company. A valuation was carried out by the Group's internal valuers. Eventually, one of the companies within the Group – its property arm – bought the property. For convenience, I shall treat it as a purchase by HLYD. Encik Sivabalah, with his customary frankness, conceded that it was an arms length transaction. He said that apart from the brother's interest in the matter, the acquisition by HLYD was an entirely normal transaction.

The respondent's brother received a commission from the vendor for successfully concluding the sale. It is common ground that he did not receive a single cent from HLYD or for that matter from any company within the Group. Nor is there the slightest suggestion that the respondent received any pecuniary benefit from the transaction. It is the appellant's case that the respondent spoke not a word of his brother's interest to the board of HLYD. The Group, however, came to know about it in the following way.

In 1985, one Wong Hup Mooi, the personal representative of the estate of one of the other brokers involved in the transaction, brought an action against the vendor in the Sessions Court at Kuala Lumpur. The claim was for commission which the plaintiff in that suit claimed to be payable to the broker's estate in respect of the sale by the vendor to HLYD. The action was heard in 1989, some four years after its institution. Both the respondent and his brother were called as witnesses and gave evidence on behalf of the vendor. There are passages in the respondent's evidence, read to us by Encik Sivabalah during argument, which seem to suggest that the respondent did not make any disclosure of his brother's interest to HLYD.

Sometime in the later half of November 1989, the appellant came to learn of the respondent's testimony in the civil action. On 27 November 1989, it wrote to the respondent asking him to explain why he had failed to disclose his brother's interest in the sale of the property to HLYD. This is what the letter said:

Hong Leong Equipment Sdn. Bhd.

Private & Confidential

27 November 1989

Mr. Liew Fook Chuan
Present

Dear Mr. Liew

It has come to our attention that you have given evidence in the recent Sessions Court case of Wong Hup Mooi (suing as Director of the estate of Don Ooi Chin Soon) v. Kee Huat Radio Co. Sdn. Bhd.

In your evidence in Court, you testified that:

(a) on or about 17 January 1983, you in your capacity as General Manager of Hong Leong Yamaha Distributors Sdn. Bhd. ('HLYD') took part in negotiations with one Teo Chiang Kok for the purchase by HLYD of a piece of land held under State Lease 4249, Lot No. 27, Section 20, Petaling Jaya ('the land');

(b) that your brother, Liew Chin Chuan ('LCC') informed you that the land was available for sale;

(c) that LCC obtained a brokerage fee of Ringgit One Hundred Thousand (RM100,000) from Kee Huat Radio Co. Sdn. Bhd. upon the successful completion of the sale of the land; and

(d) that your brother's interest as broker for the transaction was never disclosed to the management at any point of time.

As an employee of the company, you have a duty not to put yourself in a position where your personal interest would or might conflict with the interest of the company. This duty imposed by the law is also embodied in part in s. B1 of the Group Personnel Manual.

In view of your testimony during the said Sessions Court case, kindly submit a written explanation acceptable to us within 10 days from the date hereof to the following questions:

(1) Why did you participate actively in the negotiations with Mr. Teo Chiang Kok for the purchase of the land when your brother was involved as a broker?

(2) Why you did not inform HLPM regarding your negotiations with Mr. Teo Chiang Kok when you might be or should be aware that HLPM (the property company for the Group) was also looking for or negotiating the land for HL1?

(3) Why you did not inform your Managing Director then or the Board of HLMC regarding your brother's interest in the land transaction when you were negotiating for the purchase of the land?

(4) Why did you give the impression to Mr. Teo Chiang Kok that HLYD was the purchaser and why did you request Mr. Teo Chiang Kok to pay the commission to your brother?

Should we not receive any explanation from you within the time stipulated, it will be presumed that you have no explanation to offer, in which case the appropriate action will be taken on this matter.

Yours faithfully

Sgd.
Lim How Soon
Director

A few weeks later, the appellant wrote once again to the respondent asking for an explanation in respect of quite a different matter. I do not propose to say anything about it because the appellant's letter speaks for itself:

Hong Leong Equipment Sdn. Bhd.

Private & Confidential

14 December 1989

Mr. Liew Fook Chuan
Present

Dear Mr. Liew

It has come to our attention that you have taken up employment or engaged yourself in other business belonging to a company known as Asia-Pacific Advisory Group Sdn. Bhd. ('APAG').

As an employee of the company you have a duty not to put yourself in a position where your personal interest would or might conflict with interest of the company. This duty in imposed by law and is also embodied in s. B1 of the Group Personnel Manual.

In view of the above kindly submit a written explanation acceptable to us within 7 days from the date hereof to the following queries:

(a) When did you take up employment in APAG?

(b) Do you have any proprietary or pecuniary interest in APAG?

(c) Why did you not inform or disclose to the company regarding your employment or interest in APAG?

Should we not receive any explanation from you within the time stipulated above, it will be presumed that you have no explanation to offer in which case appropriate action will be taken against you on this matter.

Yours faithfully
Sgd.
Lim How Soon
Director

The respondent replied each of these letters separately. His replies are epitomes of brevity. They read as follows:

Private & Confidential

18 December 1989

Mr. Lim How Soon
Present

Dear Mr. Lim

I refer to your letter dated 27 November 1989 and the queries raised:

(1) I was instructed by Mr. Kwek Leng Hai.

(2) Since the instruction came from Mr. Kwek Leng Hai, I assumed Mr. Kwek kept HLPM informed.

(3) As there was no brokerage commission from the buyer I did not think that was necessary.

(4) At that time HLYD was the purchaser, and it was my brother who brought to my notice the property for sale.

Yours sincerely

Sgd.
Liew Fook Chuan

Private & Confidential

18 December 1989

Mr. Lim How Soon
Present

Dear Mr. Lim

I refer to your letter dated 14 December 1989 and the queries raised:

(a) I did not take up employment with APAG.

(b) I have a RM1 share interest.

(c) I did not think of it as an interest of any consequence.

Yours sincerely

Sgd.
Liew Fook Chuan

Following this exchange of correspondence, the appellant conducted a domestic inquiry on 6 February 1990, against the respondent. Notice of this inquiry was given to the respondent by way of a letter dated 16 January 1990. Three charges of misconduct were framed against him. They are as follows:

1) That in the transaction for the sale and purchase of the land held under State Lease 4249 Lot No. 27, Section 20, Petaling Jaya ('the land') between Kee Huat Radio ('the vendor') and Hong Leong Industries Berhad ('the purchaser'), you had entered into negotiations with Mr. Teo Chiang Kok, the agent ('the agent') of the registered owner of the land, without informing your superior(s) of your brother's interest as broker for the transaction and obtaining their prior approval for your undertaking and continuation of your negotiation, notwithstanding your brother's said interest. In so doing you had put yourself in a position where your personal interest would or might conflict with the interest of the Hong Leong Industries Group without the prior knowledge and consent of your superior(s). This is in breach of your duties and responsibilities and the implied terms and conditions of your employment.

2) That you had engaged and/or concerned yourself and/or had an interest in the business of Asia-Pacific Advisory Group Sdn. Bhd. without obtaining the prior written approval of the Board of Directors of Hong Leong Equipment Sdn. Bhd. or the Board of Directors of Hong Leong Management Co. Sdn. Bhd. This is in breach of your term and conditions of employment set out in item 4(a)(ii) of s. B1 of the Hong Leong Group Manual on Personnel Regulations and Policies.

3) That you had engaged and/or concerned yourself and/or had an interest in the business of Finnova Corporation Sdn. Bhd. without obtaining the prior written approval of the Board of Directors of Hong Leong Equipment Sdn. Bhd. or the Board of Directors of Hong Leong Management Co. Sdn. Bhd. This is in breach of your terms and conditions of employment set out in item 4(a)(ii) of s. B1 of the Hong Leong Group Manual on Personnel Regulations and Policies.

The letters from the appellant to the respondent as well as the charges framed against him all speak of the Group Personnel Manual. I will, in this judgment, refer to it as 'the terms and conditions of employment'. It is therefore appropriate to refer to the relevant parts of this document which was produced and handed down by the Group to its employees in 1981, that is to say, some four years after the respondent had been employed by the Group.

Terms and Conditions of Employment for Executives

4. **Restraint**

a. The executive shall devote his whole time, attention, energies, and skill solely to the business of the company or Group and shall not be concerned or interested directly or indirectly in any business or work other than of the company or Group. Without the written approval or permission of the company or Group, no executive is allowed, during the period of the executive's employment with the company or Group:

i) To take up employment, whether paid or unpaid, of another employer; or

ii) To engage or concern himself or be interested in any other business, whether or not the business belongs to him or to any member of his family or any other person or corporation; or

iii) To have proprietary or pecuniary interest in the business of any other company, firm or individual, business of which is in whole or in part similar to any trade or business carried on by the company or Group; or

iv) To invest in any manner, other than stocks and shares quoted on Stock Exchanges and fixed deposits and savings; or

v) To trade with any company or firm in which the executive or his family or any other members of the staff is interested directly or indirectly; or

vi) To have any outside interest which is in direct conflict with the business of the company in which the executive manages.

b. Any executive found to be so employed, engaged, invested, traded, concerned or interested in business will be regarded to have wilfully breached a condition of employment and the Group or company reserves the right to terminate the contract of employment forthwith without notice or to take other action as the Group or company deems fit.

c. An executive of the Group or company shall not, either during the continuance of his employment or thereafter, except in the proper course of his or her duties, divulge to any person whosoever and shall use his or her best endeavours to prevent the publication or disclosure of any trade secrets or manufacturing process or any information concerning the business or finance of the company or any dealings, transactions or affairs which may come to his or her knowledge during or in the course of his or her employment. If he or she is found to have divulged or have caused to divulge or to have failed to use his or her best endeavours to prevent the publication or disclosure of such secrets or processes, the Group or company reserves the right to terminate the contract of employment forthwith without notice and/or to take the appropriate legal action against the defaulting executive.

d. No executive and managerial staff shall be or continue to be a member or officer of any trade union representing the non-executive employees.

5. **Disciplinary Action**

If any executive is found to have committed wilful disobedience to lawful orders, or wilful neglect of duties, or negligence causing loss or damage to life and property, or dishonesty, or misconduct inconsistent with the fulfillment of the express or implied conditions of service, he or she shall be informed of the wrong he or she is alleged to have committed and be given an opportunity to be heard either in writing or at an inquiry. In respect of an inquiry, the Inquiring Officer or Panel shall comprise of representatives of the company and/or the Group. **If**

the employee fails to exculpate himself or herself, the appropriate disciplinary action including termination of employment shall be taken against him or her. Any disciplinary action taken shall not preclude the company or the Group from taking any other actions, legal or otherwise, if required. Where required, an executive who is alleged to have committed misconduct may be suspended from work for a period of up to one week at half pay for the purposes of investigation and/or for the holding of an inquiry. Disciplinary action taken against any executive should be notified to the Group Personnel Dept., HLMC for information and record. (Emphasis added.)

Considerable argument was addressed on the question whether the terms and conditions of employment ever applied to the respondent. Attention was also drawn to the paragraph which reverses the burden of proof and upon which I have placed emphasis. These are matters that I shall deal with later in this judgment.

At the inquiry, each of the three charges were specifically put to the respondent. He denied them all and gave an oral explanation in respect of each. By a letter dated 22 February 1990, the appellant informed the respondent that he was dismissed from service with immediate effect.

After his dismissal, the respondent, on 14 April 1990, lodged a complaint with the Director-General of Industrial Relations under s. 20(1) of the Industrial Relations Act 1967 ('the Act'). The office of the Director-General then proceeded to conduct a conciliatory meeting between the parties. It was held on 8 May 1990. But it came to naught because the parties could not arrive at an amicable settlement. Then, on 19 June 1990, the respondent wrote to the Deputy Director. It is a letter of some importance and was referred to us by both sides. For that reason I shall reproduce it here. This is what it says:

Liew Fook Chuan
12 Psn. Negeri Sembilan
Bukit Persekutuan
50480 Kuala Lumpur

19 June 1990

Timbalan Pengarah
Pejabat Perhubungan Perusahaan
Wilayah Persekutuan/Selangor Darul Ehsan
Tingkat 5, Bangunan Koperasi Polis
No. 1 Jalan Sulaiman
50000 Kuala Lumpur

Attn. Mr. A Murugavell

Tuan

Re: **Appeal of Reinstatement**

Further to our meeting on 8 May 1990, I send herewith my career history in the Hong Leong Group from 1977 to 1990.

Looking at all that has happened, I feel that my unjustified dismissal is the result of the vindictive action of Mr. Roger Tan manouevering the Hong Leong Management. Mr. Roger Tan joined the Hong Leong Group at about the same time as I and also at the same grade but through politicking has somehow engineered himself into the position of Group Managing Director of Hong Leong even though he has no known successful track record. I believe that my fighting spirit to make the best of any situation he puts me in and my insight of his character drove him to find ways and means to put an end to my success as in time truth may reveal itself.

You are my only hope of justice, as the Management of Hong Leong is already under the control of Mr. Tan through his political manoeuvering. My record needs to be set right because my reputation and therefore my future hinge on this one chance of letting the facts be known. It would be grossly unfair if in the process of satisfying his selfish ends he is also allowed to succeed not only in ending my successful career in the powerful Hong Leong Group but also at the same time in ensuring that the future for me and my family is insecure.

I therefore humbly appeal to your good office that my case be referred to the Industrial Court for an award so that the wrong done to me can be remedied.

Thank you.

Yours faithfully
Liew Fook Chuan

The next significant event occurred on 20 October 1990. The evidence filed on the Minister's behalf in the Court below reveals that on that date, the Director-General reported to the Minister that the representation made by the respondent could not be settled. The Minister, having considered the report of the Director-General and acting I upon the strength of the material made available to the Director-General, came to the conclusion that the respondent's representation ought not to be referred to the Industrial Court for adjudication. His decision to this effect was communicated to the respondent by a letter dated 13 November 1990.

The respondent then took out an application for certiorari to quash the Minister's decision and for an order of mandamus to compel the Minister to refer the dispute to the Industrial Court. Initially, the Minister was the only party cited in the application. Later, the appellant applied to be joined as a party to the proceedings. That application was granted and the respondent's motion for prerogative relief was then proceeded with. The learned Judge who heard the application, granted the relief sought. It is against his decision that the present appeals have been brought.

The Submissions of Counsel

In support of their respective appeals, Counsel for the appellant and learned Senior Federal Counsel who appeared for the Minister advanced several arguments. Since there was considerable overlap in their submissions, I propose to first set out so much of their submissions as are common to both appeals and then set out those submissions of the learned Senior Federal Counsel which were made specifically in support of the Minister's appeal.

I do not think that I do any injustice to Encik Sivabalah or Cik Haliza if I summarise the submissions common to both of them in the following way:

(1) Section 20(3) of the Act confers a discretion upon the Minister whether to refer or not to refer, to the Industrial Court, representations made under s. 20(1) of the Act. When he exercised his discretion not to refer the respondent's complaint to the Industrial Court, he did not take any decision in the legal sense;

(2) The question whether, on the material before him, the dispute merits reference is for the Minister to decide. If the report of the Director-General discloses a dispute involving serious issues of fact or of law, then the Minister ought to refer the dispute to the Industrial Court. However, in respect of the present case, there were no such issues, so that the Minister was quite right in not referring the dispute;

(3) Following from submission (2), in this case there is an additional factor which weighs heavily in favour of the Minister's exercise of discretion against the respondent. The domestic inquiry which was conducted by the appellant found the respondent guilty of the misconduct alleged against him. Some of the facts and contentions raised before the High Court were never mentioned by the respondent at the domestic inquiry. The material before the Minister was therefore quite different from that which was later placed before the learned Judge;

(4) The discretion of the Minister is subject to judicial review, but only if he misconstrued the statutory provision under which he acted or took into account irrelevant considerations or failed to take into account relevant considerations or asked himself the wrong question or came to a decision which was irrational. In other words, the Minister's exercise of discretion is safe from judicial review if he did not commit what I termed as an 'Anisminic error' in *Syarikat Kenderaan Melayu Kelantan Bhd. v. Transport Workers' Union* [1995] 2 CLJ 748; [1995] 2 MLJ 317, 342, or, if his decision was not affected by what has come to be known as 'Wednesbury unreasonableness';

(5) A Court is not entitled to scrutinise the facts of a case for the purpose of deciding whether the Minister had exercised his discretion in accordance with law as this would amount to an exercise of appellate jurisdiction and therefore be in violation of the principles governing judicial review. The learned Judge in the Court below did in fact carry out such an examination and thereby exceeded the permitted ambit;

(6) Even if a scrutiny of the factual matrix is permissible, there was, in this case, ample material before the Minister to justify his decision and any reasonable Minister similarly circumstanced as this Minister would have come to the same conclusion;

(7) The learned Judge when quashing the Minister's decision not to refer, did not identify the irrelevant considerations which the latter had taken into account or the relevant considerations he had omitted to take into account or in what way and to what extent the Minister's decision was unreasonable;

(8) The Minister when exercising the discretion conferred upon him by s. 20(3) of the Act was performing an administrative as opposed to a quasi judicial function. He was therefore under no obligation to furnish reasons. His failure to give reasons for the decision reached does not entitle this Court to infer that he had no good reasons for taking the decision he did.

These, then, are the arguments common to both appeals. The only area in which the Minister and the appellant do not stand on common ground relates to the grant of mandamus by the learned Judge. When he commenced his submissions, Encik Sivabalah took the position that even if the learned Judge was correct in issuing certiorari, he was certainly wrong in compelling the Minister to refer the dispute to the Industrial Court. He argued that, at best, all that could and should have been done was to issue mandamus requiring the Minister to reconsider the matter according to law. However, in the course of argument he retreated from the extreme position he had taken and agreed that a direction compelling the Minister to refer the dispute to the Industrial Court could properly be issued.

Cik Haliza's argument proceeded along the same lines as Encik Sivabalah. But she went further to suggest that the only applicable provision was s. 45 of the Specific Relief Act 1950 by the terms of which no mandamus could be issued at all in this case. Encik Sivabalah did not agree with that submission. However, like him, Cik Haliza too conceded that a direction in the terms adverted to earlier could be given to the Minister.

So much for the submissions made in support of the appeals.

In responding to the appeals, Dato' V.K. Lingham made the following submissions:

(1) The right to earn a livelihood is a fundamental right guaranteed by the Federal Constitution and is to be regarded as having proprietary value;

(2) Parliament, in order to remedy the defects at common law, has enacted a special legislation in the form of the Act and created a machinery to afford protection to a workman who has been dismissed without just cause or excuse. It is therefore incumbent upon the Minister who is invested with the power to refer disputes to the Industrial Court to act fairly and justly when exercising that power;

(3) On the material placed before him, a reasonable Minister similarly circumstanced as this Minister would have referred the respondent's complaint to the Industrial Court;

(4) A Court is entitled to undertake a critical examination of the facts of a particular complaint to determine whether the Minister's decision was reasonable. The correct legal approach is to determine whether the complaint when viewed against its factual background is frivolous or vexatious. If it is not, then the Minister must refer the dispute to the Industrial Court. On the facts of this case, the dispute was neither frivolous nor vexatious and the Minister's decision not to refer is therefore bad in law;

(5) By reason of the nature of the power vested in the Minister, if he falls to give reasons for his refusal to refer a dispute to the Industrial Court, it may be reasonably inferred that he had no valid reasons for the decision he made;

(6) The material that was made available to the learned Judge in the High Court was the same as that which was before the Minister. The fact that the domestic inquiry found the respondent guilty of misconduct is irrelevant;

(7) The learned Judge was correct in issuing mandamus to the Minister requiring him to refer the dispute to the Industrial Court. Even if he was wrong in doing so, this Court may issue a direction to the Minister under para. 1 of the Schedule to the Courts of Judicature Act 1964, requiring him to refer the dispute.

Rather than dealing with each of these submissions *in seriatim,* I propose to discuss them under the broad topics which they raise.

But there is one submission which, I think, may be conveniently dealt with now. It is the fourth submission made in support of the appeals with which I entirely agree. No quarrel may be had with the proposition that the exercise of executive discretion is subject to the fetters which Counsel have correctly formulated. There are but a few exceptions to the rule, none of which are relevant to these appeals. So much for the fourth submission.

I shall now begin my consideration of the other arguments advanced in these appeals. In order to properly appreciate them, and indeed the whole of the jurisprudence that our Courts have developed in the field of industrial law, it is necessary to first examine the rules of the common law that govern the relationship of employer and employee.

The Position at Common Law

At common law, an employee who is dismissed in breach of the terms of the contract governing his employment may sue for damages for breach of contract. He may not, save in very exceptional cases, obtain specific enforcement of his contract. See, *Francis v. Municipal Councillors of Kuala Lumpur* [1962] MLJ 407. The remedy available to an employee at common law was best described by Raja Azlan Shah J (as he then was) in *Menon v. The Brooklands (Selangor) Rubber Co. Ltd.* [1968] 1 MLJ 15. His judgment was upheld by the then Federal Court whose decision is reported at [1968] 2 MLJ 186. But I prefer to quote from the judgment handed down at first instance. This is what Raja Azlan Shah J said (at p. 16):

> The fact that the master has not heard the servant in his own defence is irrelevant; the criterion is whether facts emerging at the trial prove breach of contract. If the facts do not warrant summary dismissal, the master must pay damages; see *Ridge v. Baldwin* [1963] 2 All ER 66, 71. The onus is on the defendants to prove that summary dismissal was justified: see *Savage v. British India Steam Navigation Co. Ltd.* 46 TLR 295.

The common law, in its dealings with workmen, is therefore both archaic and unfair. It is based upon English medieval notions of a vassal's subservience to the lord of a manor. Hence the use of the demeaning expression "master and servant." It appears that, at least for the moment, little may be done to improve the position because of well-entrenched principles of the common law and doctrines of equity.

In *Dato' Abdullah bin Ahmad v. Syarikat Permodalan Kebangsaan Bhd. & Ors.* [1990] 3 MLJ 505, Chan J (now JCA) made a valiant attempt to free our common law of its medieval shackles by awarding specific relief in what was essentially a case of wrongful dismissal. His reasoning had the merit of logic and justice. But he was reversed by the Supreme Court which preferred the traditional view. See, *Dato' H.M Shah v. Dato' Abdullah bin Ahmad* [1991] 1 CLJ 238; [1991] 1 MLJ 91. So the outdated principles of the common law and doctrines of equity continue to work their will in this area of the law.

It was against this background that Parliament intervened. That intervention came in the form of the Act, followed by a series of amendments made to it, including the introduction of s. 20 in its present form. Since that section lies at the heart of the present appeals I shall now turn my attention to it.

Position under the Act

Section 20 of the Act provides as follows:

20. Representations on dismissals.

(1) Where a workman, irrespective of whether he is a member of a trade union of workmen or otherwise, considers that he has been dismissed without just cause or excuse by his employer, he may make representations in writing to the Director-General to be reinstated in his former employment; the representations may be filed at the office of the Director-General nearest to the place of employment from which the workman was dismissed.

(1A) The Director-General shall not entertain any representations under sub-s. (1) unless such representations are filed within sixty days of the dismissal:

Provided that where a workman is dismissed with notice he may file a representation at any time during the period of such notice but not later than sixty days from the expiry thereof.

(2) Upon receipt of the representations the Director-General shall take such steps as he may consider necessary or expedient so that an expeditious settlement thereof is arrived at; where the Director-General is satisfied that there is no likelihood of the representations being settled, he shall notify the Minister accordingly.

(3) Upon receiving the notification of the Director-General under sub-s. (2), the Minister may, if he thinks fit, refer the representations to the Court for an award.

(4) Where an award has been made under sub-s. (3), the award shall operate as a bar to any action for damages by the workman in any Court in respect of wrongful dismissal.

(5) This section shall not apply to the dismissal of a workman in circumstances arising out of a contravention of s. 59 where proceedings have been commenced before a Court in respect of an offence under s. 59(1); where, while proceedings are pending under this section, proceedings arising out of the same dismissal are commenced before a Court in respect of an offence under s. 59(1), the proceedings under this section shall not be proceeded with further.

(6) In any proceedings under sub-s. (2):

(a) an employer may represent himself or be represented by his duly authorized employee or, where he is a member of a trade union of employers, be represented by an officer or employee of such trade union of employers or, notwithstanding anything to the contrary contained in any written law relating to the registration of trade unions, by any official of an organisation of employers registered in Malaysia (not being a trade union of employers);

(b) a workman may represent himself or, where he is a member of a trade union of workmen, be represented by an officer or employee of such trade union of workmen or, notwithstanding anything to the contrary contained in any written law relating to the registration of trade unions, by any official of an organisation of workmen registered in Malaysia (not being a trade union of workmen).

(7) Save as provided in sub-s. (6), a workman or employer shall not be represented by an advocate, adviser, consultant or by any other person whatsoever.

(8) For the purpose of carrying out his functions under this section the Director-General:

(a) shall have the power to direct either party to furnish to him, within such period as may be specified in that direction, such information as he may consider necessary or relevant; and

(b) may, if he deems it necessary or expedient, direct any person engaged in or connected directly or indirectly with the dismissals to attend a conference to be presided over by the Director-General or such person as he may appoint at such time and place as may be specified in the direction.

This section has an interesting history. I shall not go into it at any length in this judgment. But some mention must be made of it to fully appreciate parliamentary purpose.

When the Act was first passed in 1967, it did not carry any provision akin to the present s. 20. The Minister's power to refer trade disputes to the Industrial Court was confined to disputes between a trade union and an employer. Non-union workmen were left to the harsh consequences of a common law founded upon outdated concepts. Parliament saw and recognised the injustices meted out to non-union workmen. It acted.

By an amendment passed in 1971, there was introduced into the Act s. 16A under which the power to deal with complaints of dismissal by non-union workmen and to give them relief was vested in the Minister. A further amendment to the Act deleted s. 16A and introduced s. 20, but not in its present form. For the first time, the beneficial provisions of the Act were made available to a non-union workman who considered himself to have been wrongfully dismissed.

The former s. 20 conferred upon the Minister a discretion whether to refer the complaint of a non-union workman to the Industrial Court. Once referred, the Industrial Court could hear and adjudicate on the claim. If it came to the conclusion that there had been a dismissal which was without just cause or

excuse, it could direct reinstatement – a remedy, as earlier observed, not readily available in the ordinary Courts. Or, it could order the payment of reasonable compensation, which in monetary terms may, and often does, far exceed the meagre damages for breach of a contract of service recoverable at common law.

But there were many drawbacks and a general lacuna in the former provision. A union member who had been dismissed and whose cause his union declined to espouse was bereft of any remedy under the Act. The powers of the Director-General at the conciliatory stage were not clearly spelled out. The time to lodge a complaint with the Director-General was limited to one month which period was often found to be inadequate. There was much uncertainty as to when time began to run when the dismissal was not summary but cloaked as a contractual termination. It is to remedy these matters that the former s. 20 was wholly repealed and the provision in its present form was enacted. Other extensive amendments were also made to the Act. But they are not relevant to these appeals. All these amendments were made in 1989. The amendments to s. 20, however, left intact the Minister's discretion conferred upon him by the predecessor section.

Approach to Interpretation

I have thus far alluded to the position at common law and the legislative history behind s. 20 of the Act. My purpose in doing so is to use it as an aid to ascertain Parliament's intention in enacting the section, and more particularly, its third subsection which confers a discretion upon the Minister, the exercise of which forms the subject matter of these appeals. In my judgment, the purpose for which Parliament passed the Act may not be properly discovered unless one bears in mind the general background against which the legislature acted. In this way, one may gather the true spirit and intendment of the provision that has fallen for construction in these appeals.

In *Stock v. Frank Jones (Tipton) Ltd.* [1978] 1 WLR 231, Lord Simon (at p. 236 of the report) referred to it as, "the 'functional' construction of a statute." But whatever be the nomenclature employed, the method of interpreting legislation now under discussion is of ancient repute.

In *Heydon's Case* [1584] 76 ER 637, all the Judges of the realm assembled to render their opinion upon an Act of Parliament which they were called upon to interpret. Their resolution, which has come to be known as the rule in *Heydon's Case*, was expressed in the following terms:

> And it was resolved by them (the Judges) that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered:

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1st	What was the common law before the making of the Act.
2nd	What was the mischief and defect for which the common law did not provide.
3rd	What remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth.
and 4th	The true reason of the remedy: and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo* (for private convenience) and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico* (for public benefit).

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I must confess that I have searched in vain for so clear a statement of the duty cast upon a judicial interpreter of parliamentary intention. Judgments in later cases have either sought to improve the rule or to explain it. However, they are all, with great respect to the eminent Judges who spoke upon the subject, but a pale reflection of the true original.

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Adopting the approach that has commended itself to me, it cannot be in doubt that s. 20 must, as a whole, receive an interpretation that will have the effect of advancing the purpose for which Parliament passed the Act. To invert the proposition, this Court should not, in the process of determining the true nature and scope of s. 20, apply a rule of construction that will have the effect of thwarting the object for which Parliament has enacted the section. That object may be gauged from the way in which the legislature, fully cognisant of the inadequacies of the common law in the area of employment, has intervened with a view to improve the legal position in favour of workmen. It has done so in stages through the amendments I have earlier referred to. Each amendment was an improvement upon the former – a clear move in a forward direction.

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The section is obviously a remedial provision, housed in an Act that is itself a piece of beneficent social legislation. It should, therefore, based on the rule in *Heydon's Case* receive a broad and liberal interpretation

It cannot be gainsaid that Parliament intended to elevate the status of a workman as defined in the Act from the weak and subordinate position assigned to him by the common law to a much stronger position. The legislature has willed that the relationship of employer and workman as resting on a mere consensual basis that is capable of termination by the employer at will with the meagre consequence of paying the hapless workman a paltry sum as damages should be altered in favour of the workman. It has accordingly provided for security of tenure and equated the right to be engaged in gainful employment to a proprietary right which may not be forfeited save and except

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for just cause or excuse. Due recognition of this higher status must therefore be accorded by our Courts if they are to act in obedience to the will of Parliament.

Employment as a Fundamental Right

Quite apart from being a proprietary right, the right to livelihood is one of those fundamental liberties guaranteed under Part II of the Federal Constitution. See, *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor.* [1996] 2 CLJ 771 and the cases cited therein. The reasons for the view taken having been expressed by the majority in that case, I find it unnecessary to repeat them here. Suffice to say that the expression "life" appearing in Art. 5(1) of the Federal Constitution is wide enough to encompass the right to livelihood.

The desire of Parliament to protect the nation's work-force from the harshness of an unbending and inveterate common law and doctrines of equity, as expressed by the passing of the Act, may thus be seen to be entirely in harmony with the terms of the supreme law of the Federation. The high standards of social justice so carefully established by the legislature and by the framers of the Federal Constitution ought not, in my judgment, to be consciously lowered by any decision of this Court.

Ambit of the Minister's Discretion

Having determined the nature of the right vested in a workman by Parliament and the Federal Constitution, it now becomes necessary to deal with those matters that are relevant to the exercise of the discretion conferred upon the Minister by s. 20(3) of the Act.

But before I embark upon a discussion of the law in this area, it may be convenient to dispose of the first submission advanced on behalf of the appellant and adopted by learned Senior Federal Counsel. It is to the effect that the Minister does not make a decision when he exercise his discretion under s. 20(3).

Let me say at once that I have no difficulty in rejecting this argument. It is quite clear that the section under consideration gives the Minister a choice. He may either refer the representations to the Industrial Court or he may refuse to do so. When he settles upon the particular course that appeals to him, he makes a decision. He decides whether the matter should go further or should terminate at his level. The exercise of any discretion – executive or judicial – results in the making of a decision and no amount of intellectual gymnastics can produce an opposite conclusion.

With that I now turn to the subject at hand.

Now, it is clear that Parliament has, by the language it has employed in the third sub-section to s. 20, conferred upon the Minister power to refer to the Industrial Court for an award, representations made under the first sub-section. The actual words by which the power, or more appropriately, the discretion, is conferred are, "may, if he thinks fit."

The sub-section, however, gives no indication of the factors or considerations by which the Minister is to be guided when exercising his discretion. Yet, all before us are agreed that the Minister's discretion is fettered. Indeed, both Counsel for the appellant and the Minister correctly concede, as I have earlier observed, that the exercise of discretion under s. 20(3) may be quashed if in its exercise there was committed one or more 'Anisminic errors' or if the decision arrived at was tainted with 'Wednesbury unreasonableness'.

That said, it is however, necessary and desirable to identify, with as much precision as possible, the parameters of the discretion conferred by Parliament upon the Minister. There are two reasons for this. First, all those who are charged with the implementation of the Act should be able to gauge with fair certainty the ambit of the discretion, the exercise of which is called for from time to time. Second, Courts which are the repository of the power of judicial review of administrative action need to ascertain whether, in a given case, there may or may not have been an transgression beyond the permitted ambit.

It may, I think, be stated as a very general guide that a fair exercise of the discretion in question would be that which best achieves the object of the Act. That object is disclosed in the preamble to the Act which declares itself to be an Act:

> to provide for the regulation of the relations between employers and workmen and their trade unions and the prevention and settlement of any differences or disputes arising from their relationship and generally to deal with trade disputes and matters arising therefrom.

The approach that ought to be taken in a case where statute confers upon the executive a discretion to refer a dispute to a tribunal specially created for that purpose was stated by Lord Denning MR in his dissenting judgment in *Padfield v. Minister of Agriculture, Fisheries & Food* [1968] AC 997, 1006 as follows:

> It is said that the decision of the Minister is administrative and not judicial. But that does not mean that he can do as he likes, regardless of right or wrong. Nor does it mean that the Courts are powerless to correct him. **Good administration requires that complaints should be investigated and that grievances should be remedied.** When Parliament has set up machinery for that very purpose, it is not for the Minister to brush it on one side. He should not refuse to have a complaint investigated without good reason." (Emphasis added.)

On further appeal, the House of Lords (Lord Morris of Borth-y-Gest dissenting) upheld the minority view expressed by the Master of the Rolls and reversed the majority. Upon the requirement that executive discretion should be exercised so as to attain the objects and policy of the Act conferring such discretion, the following opinions appearing in the speeches of the majority of the House are of assistance:

> It is implicit in the argument for the Minister that there are only two possible interpretations of this provision – either he must refer every complaint or he has an unfettered discretion to refuse to refer in any case. I do not think that is right. Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the Court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the Court. (per Lord Reid, at p. 1030):

> The discretion must be exercised by the Minister in accordance with the intention of the Act but there is nothing in the language used in the subsection introduced by the words 'if the Minister in any case so directs' nor in the context of the Act and earlier legislation to support the view that an absolute right to an enquiry is given to an aggrieved person. The argument of the appellants is undermined, in my opinion, by their concession that trivial, frivolous or vexatious complaints can be shut out as, for example, where a complaint has been recently dealt with in a parallel case. True that the scheme is of a compulsory nature and s. 19 is designed for the redress of grievances but this is not to exclude the Minister's discretion to reject a complaint if he exercises his discretion according to law. The succeeding section, s. 20 of the Act, indicates the position of the Minister as responsible for giving directions to a board as to its acts or omissions as he considers necessary or expedient in the public interest and his directions have to be complied with so far as the board is not required to do anything which it has no power to do. (per Lord Hodson, at pp. 1045-6):

> It is quite clear from the Act in question that the Minister is intended to have some duty in the matter. It is conceded that he must properly consider the complaint. He cannot throw it unread into the waste paper basket. He cannot simply say (albeit honestly) 'I think that in general the investigation of complaints has a disruptive effect on the scheme and leads to more trouble than (on balance) it is worth; I shall therefore never refer anything to the committee of investigation.' To allow him to do so would be to give him power to set aside for his period as Minister the obvious set intention of Parliament, namely, that an independent committee set up for the purpose should investigate grievances and that their report should be available to Parliament. This was clearly never intended by the Act. Nor was it intended that he could silently thwart its intention by failing to carry out its purposes. (per Lord Pearce, at p. 1053):

> My Lords, I believe that the introduction of the adjective 'unfettered' and its reliance thereon as an answer to the appellants' claim is one of the fundamental matters confounding the Minister's attitude, *bona fide* though it be. First, the adjective nowhere appears in s. 19, it is an unauthorised gloss by the Minister. Secondly, even if the section did contain that adjective I doubt if it would make any difference in law to his powers, save to emphasise what he has already, namely that acting lawfully he has a power of decision which cannot be controlled by the Courts; it is unfettered. But the use of that adjective, even in an Act of Parliament, can do nothing to unfetter the control which the judiciary have over the executive, namely that in exercising their powers the latter must act lawfully and that is a matter to be determined by looking at the Act and its scope and object in conferring a discretion upon the Minister rather than by the use of adjectives. (per Lord Upjohn, at p. 1060).

Put simply, the first question which the Minister ought to ask himself is whether the way in which he proposes to exercise his discretion will have the effect of preventing or settling the particular dispute; for that is what the Act is primarily aimed at. However, as I have explained just a moment ago, this approach to the exercise of discretion is only a very general guide because a rigid adherence to it may result in every case being referred to the Industrial Court. That this is certainly not what Parliament intended is manifested by its conferment upon the Minister of a discretion whether to refer or not to refer a representation to the Industrial Court.

The second question that the Minister must ask himself is whether, objectively speaking, the representations made under s. 20(1) are frivolous or vexatious. If they are, then he may well be justified in refusing a reference. Whether they are or are not depends upon the facts of each case. But there are some pretty obvious cases where a reference may be properly denied.

Take the case of a workman who has admitted the commission of serious misconduct such as an assault upon his employer or a fellow employee, or to theft of his employer's property; or where, for example, the employer, after dismissing the workman, repents and reinstates or offers to reinstate him in his former employment without loss of any benefits or privileges. In all these examples, the Minister may well be within the purview of the section in declining a reference. In the last example, there is simply nothing to refer because of the reinstatement or the offer thereof. If in such a case the Minister does decide to refer, then, the exercise of his discretion may be quashed in certiorari proceedings as being obviously unreasonable. Reinstatement is the primary remedy in industrial law and an acceptance of it or an unreasonable rejection of it by the workman must be treated as having put an end to the dispute.

I pause to emphasise that the Minister's decision, one way or the other, upon the question whether representations made under s. 20(1) are frivolous or vexatious is neither final nor conclusive, and may be re-opened in judicial

review proceedings. A Court may, upon an objective assessment of the facts and material that was placed before the Minister, fairly come to the conclusion that the representation is, or is not frivolous or vexatious and hence merits reference to the Industrial Court for an award.

The approach which I adverted to a moment ago is what I will term as "the Hashim Yeop test". It was formulated by the eminent Judge, whose name it bears, *Minister of Labour, Malaysia v. Lie Seng Fatt* [1990] 1 CLJ 1103; [1990] 2 MLJ 9. The facts of that case were these.

Lie Seng Fatt was the general manager of Koperasi Belia Bersatu Bhd. ('the Koperasi'). The Koperasi terminated his services as general manager and transferred him to its wholly owned subsidiary. Encik Lie was unhappy. He complained to the Director-General who reported to the Minister. After considering the material before him, the Minister came to the conclusion that it was not a fit matter to refer to the Industrial Court. On the facts disclosed, there was clearly no dismissal, either actual or constructive. Yet, the High Court, on the application of Encik Lie, quashed the Minister's decision not to refer. The Minister appealed. In allowing the appeal, Hashim Yeop A. Sani CJ (Malaya), said (at p. 12):

> The Minister had a discretion under s. 20(3) of the Act and that is not in dispute. The issue is whether the discretion is unfettered. To say it is an unfettered discretion is a contradiction in terms. **Unfettered discretion is another name for arbitrariness.**
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> The Minister's discretion under s. 20(3) is wide but not unlimited. As stated earlier, so long as he exercises the discretion without improper motive, the exercise of discretion must not be interfered with by the Court unless he had misdirected himself in law or had taken into account irrelevant matters or had not taken into consideration relevant matters or that his decision militates against the object of the statute. **Otherwise he had a complete discretion to refer a complaint which is clearly frivolous or vexatious which in our view this is one.** (Emphasis added.)

In *Telco Convoy Drivers Mazdoor Sangh & Anor. v. State of Bihar & Ors.* [1989] 2 LLJ 558, 561 the Supreme Court of India adopted a similar approach in a case where the discretion whether to refer a dispute to the Industrial Tribunal was vested by the relevant legislation in the State Government. Dutt J, when delivering the judgment of the Court said:

> Applying the principle laid down by this Court in the above decisions, there can be no doubt that the Government was not justified in deciding the dispute. Where, as in the instant case, the dispute is whether the persons raising the dispute are workmen or not, the same cannot be decided by the Government in exercise of its administrative function under s. 10(1) of the Act. As has been held in *MP Irrigation Karamchari Sangh's* case *(supra),* (*Madhya Pradesh Irrigation Karamchari Sangh v. State of Madhya Pradesh* [1985] 1 LLJ 519) **there may be exceptional cases in which the State Government may, on a proper**

> **examination of the demand come to a conclusion that the demands are either perverse or frivolous and do not merit a reference**. Further, the Government should be very slow to attempt an examination of the demand with a view to declining reference and Courts will always be vigilant whenever the Government attempts to usurp the powers of the tribunal for adjudication of valid disputes, and to allow the Government to do so would be to render s. 10 and s. 12(5) of the Act nugatory.

That a proper application of the Hashim Yeop test calls for a critical scrutiny of the factual matrix is exemplified by at least two other decisions of the Supreme Court which were referred to us during argument. The first of these is *Minister of Labour, Malaysia v. National Union of Journalists, Malaysia* [1991] 1 CLJ 31; [1991] 1 MLJ 24, the facts of which were as follows.

One Yazid Othman was a senior journalist employed by the Utusan Melayu. In consequence of certain events, which are not relevant for present purposes, Yazid was dismissed by his employer. His cause was espoused by the Union which reported the trade dispute to the Industrial Relations Department. In due course, the Director-General made his report upon the dispute to the Minister who, in the exercise of the discretion conferred upon him by s. 26(2) of the Act, declined to refer the dispute to the Industrial Court. His decision was, on application by the Union, quashed by the High Court which also issued mandamus to the Minister directing him, "to refer the said dispute to the Industrial Court under s. 26(2) of the Industrial Relations Act 1967." (See p. 26 of the report.) However, Encik Sivabalah, during the course of argument, advised us that this was not the terms of the order of mandamus issued to the Minister. The order in that case had in fact directed the Minister to reconsider the complaint in accordance with law. But, for reasons that will appear later, nothing really turns upon the point.

To resume the narrative of that case, the Minister, being dissatisfied with the decision of the High Court, appealed to the Supreme Court, which dismissed his appeal. The judgment of the Supreme Court (comprising Hashim Yeop Sani CJ (Malaya), Harun Hashim and Jemuri Serjan SCJJ) was, on that occasion delivered by Jemuri Serjan SCJ (later CJ (Borneo)). After referring to the decisions in *Lie Seng Fatt* and *Padfield (supra)*, his Lordship said:

> The question is how should these principles be applied to the instant case? In this regard Lord Roskill's statement in *Congreve v. Home Office* [1976] 1 QB 629, at p. 657 is apt:
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> > Nothing I am about to say goes in any way outside or beyond what was authoritatively laid down in those cases. But the law does not stand still, and those cases, while stating the relevant principles, leave open their application to the particular facts of particular cases which from time to time come before the Courts.

In our view this question must be solved aliunde by examining the facts upon which the Minister expressed himself as satisfied that it was not expedient for him to refer the trade dispute to the Industrial Court. It is therefore convenient to look at the facts of this case. (Emphasis added.)

His Lordship, having conducted a meticulous examination of the facts, turned to the evidence filed by the Minister and said:

In his affidavit dated 1 April 1989, the Minister explained the reasons why he decided it was not expedient to refer the trade dispute to the Industrial Court. He had taken cognisance of the fact that the trade dispute was in respect of Yazid's dismissal by the Utusan Melayu on 4 October 1987 as a result of an alleged adverse publicity which had damaged the image of Utusan Melayu. (See paras. 4 and 5). He further found that Yazid Othman had been given an opportunity to reply to the show-cause letter issued by the Utusan Melayu (see para. 6). He had also considered all the relevant documents including the report of the union and the replies of Yazid Othman and after due and careful consideration of all the facts and circumstances of the case he was satisfied that Yazid Othman had been dismissed with just cause and excuse (see para. 8).

We could not, however, identify which of the documents were relevant documents referred to by the Minister because he did not categorically particularize which documents were relevant and which were not, bearing in mind that there were three letters from the Utusan Melayu, one letter from Yazid Othman, four letters from the union including the report and the submission, and four extracts of the newspaper reports relating to the alleged misconduct of Yazid Othman. Be that as it may, we were satisfied that the Minister had only addressed his mind and given more weight to the adverse publicity, the reply from Yazid Othman to the Utusan Melayu's letter and the letter dismissing Yazid Othman. It would seem that the facts that weighed heavily on the mind of the Minister was the adverse publicity and the somewhat unsatisfactory reply from Yazid Othman. *He completely ignored or had not given sufficient weight to the substantive allegations of misconduct against Yazid Othman, his public denial at the interview with The New Straits Times published on 30 August 1987, his denial in his letter to the Utusan Melayu, the report and the submission submitted by the union on behalf of Yazid Othman.* The submission clearly raised the question of breach of the rule of natural justice in that the Utusan Melayu dismissed Yazid Othman without proper inquiry which should have put him on notice that the validity of the dismissal could be questionable.

In our view these are factors which the Minister should have taken into consideration and should have been given sufficient weight because they are palpably relevant and if he had done so he might have come to a different conclusion. **It can therefore be said that in arriving at his decision the Minister had acted upon an incorrect basis of facts, thus vitiating the decision**. In any event these factors clearly raised a number of pertinent issues which ought to be properly inquired into by the Industrial Court and **more importantly the innocence of Yazid Othman of all the allegations against him, in the light of his denial, takes a centre stage prominence in establishing the invalidity of his dismissal.**

Perhaps, it is pertinent at this juncture to recall what Lord Denning MR said in the *Tameside* case (S*ecretary of State v. Tameside Metropolitan Borough Council* [1977] AC 1014) at p. 1025 when dealing with the exercise of discretion by an executive, particularly in such matters as this:

> Much depends on the matter about which the Secretary of State has to be satisfied. If he is satisfied on a matter of opinion, that is one thing. But if he has to be satisfied that someone has been guilty of some discreditable or unworthy or unreasonable conduct, that is another. To my mind, if a statute gives a Minister power to take drastic action if he is 'satisfied' that a local authority has acted or is proposing to act improperly or unreasonably, then the Minister should obey all the elementary rules of fairness before he finds that the local authority is guilty or before he takes drastic action overruling them.

In the light of the principles that we have adverted to earlier on in the judgment we are of the view that the Minister in refusing to refer the trade dispute to the Industrial Court upon the grounds we already mentioned had acted unlawfully or to borrow the language of Lord Upjohn in the *Padfield* case had overstepped the true limits of his discretion or as it has been frequently said in the prerogative writ cases exceeded his jurisdiction. In this respect, we agree with the finding of the learned judge.

It was urged upon us to consider our own decision of 28 May 1990 in the case of *Su Thai Seng v. Minister of Labour and Manpower & Anor.* (unreported). That case would not avail the appellants because it can easily be distinguished on its particular facts in much the same way the cases of *Lie Seng Fatt* and *National Union of Hotel, Bar and Restaurant Workers v. Minister of Labour and Manpower* [1980] 2 MLJ 189 are distinguishable. In *Su Thai Seng's* case the appellant was found guilty of insubordination and dismissed from service after due inquiry before a domestic inquiry committee. There was no question of *mala fide* in the dismissal. Therefore the Minister in that case was satisfied that the dismissal of Su Thai Seng was with just cause and excuse and therefore not a proper case for reference to the Industrial Court. The facts of the instant case were nowhere nearly similar to those of the two cases. (Emphasis added.)

The second is *Minister of Labour, Malaysia v. Chan Meng Yuen & Anor.* [1992] 2 CLJ 1808; [1992] 2 MLJ 337, the facts of which were as follows.

Chan Meng Yuen, the respondent in that case, was employed by Magnum Corporation Bhd. ('Magnum'), initially as an accountant and later as its general manager. In June 1987, Magnum retrenched Chan and paid him RM72,666.67 as retrenchment benefits. Magnum then offered him reemployment to another post on the same salary and with no loss of service. This, rather generous offer, was rejected. Chan, who considered himself as having been dismissed without just cause or excuse, then lodged a representation to the Director-General under s. 20(1) of the Act. His representation was duly referred to the Minister who, in the exercise of his discretion refused to refer it to the

Industrial Court for an award. Chan later successfully applied for certiorari and mandamus. The Minister appealed to the Supreme Court which, in allowing the appeal, undertook a careful scrutiny of the facts as demonstrated by the following passage in the judgment of Harun Hashim SCJ at p. 342 of the report:

> It was urged before us that in exercising his discretion under s. 20(3) of the Act, policy decisions come into play and following *National Union of Hotel, Bar & Restaurant Workers v. Minister of Labour and Manpower* the Courts should not interfere. In that case the Minister gave his reasons. He has not done so here but it was suggested by the learned senior federal Counsel who appeared for the Minister that the policy decision was that as there is an alternative remedy available to the respondent to seek relief in the Civil Court the Minister has acted reasonably. That may be so but the Minister has not said so and we cannot accept a statement from the Bar as being the reason the Minister had in arriving at his decision. We can only look at the facts as stated in the affidavits before the Court.
>
> What then are the facts in this case? Firstly, that the respondent is being retrenched from employment on account of the company's review of its management requirements. The company had an overseas subsidiary company (Phicom PLC) which was under the responsibility of the group general manager. That subsidiary company was disposed of in June 1987 resulting in the group general manager having less responsibilities. As the main business activity of the company is the Gaming Division, the board of directors of the company decided that the group general manager should take over direct responsibility of the Gaming Division. It is obvious that one of them had to go, either the group general manager or the respondent. The directors decided on the respondent. Secondly, retrenchment is an accepted eventuality in the private sector. In the instant case, provision was made for such an eventuality in the respondent's terms of employment and an amount of RM72,666.67 was payable to the respondent as retrenchment benefits for his nine years service with the company. Thirdly, at his request the respondent was offered re-employment by the company at the same salary with continuity of service from 1978 but he turned it down because the other terms of re-employment were not what had been promised him verbally. The position offered was that of Manager (Special Functions) reporting direct to the group general manager and to 'be given special assignments whenever necessary and where appropriate with the Magnum Group of Companies'. **This offer clearly shows that the respondent was indeed redundant to the company's management requirements in respect of his late position and an act of indulgence on the part of the company.** (Emphasis added.)

In the event, the Supreme Court came to the following conclusion:

> **On these facts,** we are of the view that the Minister acted reasonably in exercising his discretion not to refer the respondent's representations to the Industrial Court. **It certainly cannot be said that the facts point overwhelmingly in favour of a different decision.** (Emphasis added).

By reason of the views I have earlier expressed, based on the approach taken by the Supreme Court in the trilogy of cases discussed in the foregoing paragraphs of this judgment, I find no difficulty in rejecting Encik Sivabalah's fifth submission. To recall, that submission was to the effect that a Court is not entitled to undertake an examination of the facts of a case in order to determine whether the Minister had exercised his discretion in accordance with law. In each of the three cases earlier discussed, the Supreme Court, as may be plainly seen from the passages reproduced from the respective judgments, did say that the facts of each of them had to be examined and went on to scrutinise the facts.

In *Lie Seng Fatt* and *Chan Meng Yuen,* an examination of the facts revealed that the Minister had exercised his discretion properly. However, in *National Union of Journalists*, the facts when analysed led to the conclusion that the discretion had not been exercised in accordance with law. To contend, as Counsel for the appellant did, that the Supreme Court had not, in these three cases, undertaken any factual examination is unacceptable.

To summarise, when a question arises as to whether the Minister has correctly exercised his discretion under s. 20(3) of the Act, it is the solemn duty of a Court to undertake a meticulous examination of the facts that were made available to the Minister. If the examination reveals that the representations made under s. 20(1) are neither perverse, frivolous nor vexatious, a decision not to refer is liable to be quashed by an order of certiorari.

Before proceeding further, there is one other authority which I consider to be of assistance. It is *Bombay Union of Journalists v. State of Bombay* [1964] 1 LLJ 351 where Gajendragadkar J made the following observation (at p. 354 of the report):

> It is true that if the dispute in question raises questions of law, the appropriate Government should not purport to reach a final decision on the said questions of law, because that would normally lie within the jurisdiction of the Industrial Tribunal. Similarly, on disputed questions of fact, the appropriate Government cannot purport to reach final conclusions for that again would be the province of the Industrial Tribunal. But it would not be possible to accept the plea that the appropriate Government is precluded from considering even *prima facie* the merits of the dispute when it decides the question as to whether its power to make a reference should be exercised under s. 10(1) read with s. 12(5) or not. If the claim made is patently frivolous, or is clearly belated, the appropriate Government may refuse to make a reference. Likewise, if the impact of the claim on the general relation between the employer and the employees in the region is likely to be adverse, the appropriate Government may take that into account in deciding whether a reference should be made or not. It must, therefore, be held that a *prima facie* examination of the merits cannot be said to be foreign to the enquiry which the appropriate Government is entitled to make in dealing with a dispute under s. 10(1) of the Act.

It follows from these decisions that the Minister must bear in the forefront of his mind that the Act has established a special tribunal to adjudicate upon a dispute arising from representations made under s. 20(1) of the Act and that it is therefore no part of his function to arrive at a concluded view upon the merits of the dispute. His role is limited to ascertaining whether, on the facts and material placed before him, the representations raise serious questions of fact or of law calling for adjudication. And, as I have already said, his determination upon the question one way or the other is not conclusive.

That brings me to the third consideration. It arises directly from what I have said in the preceding paragraph about the facts and materials before the Minister when he makes his decision under s. 20(3) of the Act.

Now, there may be cases where an employer has held a domestic inquiry into charges of misconduct leveled against a workman and found him guilty of the alleged misconduct. Or he may have held no inquiry at all before dismissing the workman. Until very recently, there prevailed some uncertainty about the consequences that flow from a failure on the part of an employer to conduct a domestic inquiry. A study of the awards handed down by the Industrial Court shows a division of opinion on the point. Some held that the failure to conduct an inquiry was fatal and was a ground upon which relief could be granted. Others held that the failure of an employer to conduct a domestic inquiry was irrelevant as the hearing before the Industrial Court constituted a sufficient hearing.

The uncertainty that prevailed heretofore has now been resolved by the recent decision of the Federal Court in *Wong Yuen Hock v. Hong Leong Assurance Sdn. Bhd. & Anor.* [1995] 3 CLJ 344 at p. 356; [1995] 2 MLJ 753, where Mohd Azmi FCJ said (at p. 767):

> It was therefore the function of the Industrial Court in this particular case to determine on the available evidence whether Wong had misconducted himself by his involvement in the sales of the two motor car wrecks against the unwritten rules of Hong Leong which prohibited its staff from such activity. Since the answer was in the positive, the next question for the Court to ask itself was whether such misconduct constituted a 'just cause' or 'just excuse' for the dismissal? It was not within the ambit of the reference for the Industrial Court to determine whether Hong Leong ought to be punished for failing to hold a domestic inquiry. The Industrial Court was not competent to declare the dismissal void for failure to comply with the rules of natural justice. **The very purpose of the inquiry before the Industrial Court was to give both parties to the dispute an opportunity to be heard irrespective of whether there was a need for the employer to hold a contractual or statutory inquiry.** We were confident that the Industrial Court as constituted at present was capable of arriving at a fair result by fair means on all matters referred to it. If therefore there had been a procedural breach of natural justice committed by the employer at the initial stage, there was no reason why it could not be cured at the rehearing by the Industrial Court. (Emphasis added)

No clearer expression may, I think, be found of the irrelevance of an employer's failure to hold a domestic inquiry in the context of an adjudication by the Industrial Court. The converse must also, I think, hold true.

The fact that an employer has conducted a domestic inquiry against his workman is, in my judgment, an entirely irrelevant consideration to the issue whether the latter had been dismissed without just cause or excuse. The findings of a domestic inquiry are not binding upon the Industrial Court which rehears the matter afresh. However, it may take into account the fact that a domestic inquiry had been held when determining whether the particular workman was justly dismissed.

I may add that the principle in *Wong Yuen Hock (supra)* has been restated and affirmed by the Federal Court in *Milan Auto Sdn. Bhd. v. Wong Seh Yen* [1995] 4 CLJ 449; [1995] 3 MLJ 537.

All that has just been said in these two cases applies, of course, to an adjudication by the Industrial Court. But do the same considerations apply to the Minister when exercising his discretion under s. 20(3) of the Act? I think that they do.

Parliament has created three separate and distinct powers in respect of the same subject-matter and conferred each of them upon separate authorities. First, there is the conciliatory power vested in the Director-General whose sole function is to mediate and attempt to settle disputes as early as possible. It is no part of his function to ascertain the law or the facts or to make any determination upon either. If his attempts to reconcile the parties fails he merely notifies the Minister of this fact. See, *Minister of Labour and Manpower & Anor. v. Wix Corp. South East Asia Sdn. Bhd.* [1980] 2 MLJ 248, 250. If it is found in any case to have done more than what the law permits, his action will be liable to be quashed on the ground that it is *ultra vires* the Act.

Second, there is the power vested in the Minister to refer representations made under s. 20(1). It is a power he must, by reason of the combined operation of the provisions of Arts. 5(1) and 8(1) of the Federal Constitution, exercise fairly.

Third, there is the power to adjudicate upon the same representations vested in the Industrial Court which, by the terms of the Act, is enjoined to act, *inter alia,* according to equity and good conscience when making its award.

The way in which the Act is constructed makes it clear that it is only the Industrial Court which is conferred with an adjudicatory function. The two precedent powers, namely, the Director-General and the Minister cannot therefore assume a function expressly reserved to the third. It follows that, *prima facie,* considerations that are irrelevant to the Industrial Court's decision-

making process cannot be, and are not, relevant considerations *vis-á-vis* the referring authority.

Accordingly, the Minister, when exercising his discretion, ought not to be influenced by the fact that a domestic inquiry was held by an employer before dismissing his workman. Were it otherwise, the guilt or innocence of a workman upon a charge of misconduct would be decided not by the Industrial Court, but by the employer himself. That, with all respect, is not the purpose for which Parliament went through the elaborate process of legislating the Act and setting up a special machinery for the vindication of the rights of workmen.

In arriving at this conclusion, I must confess that I have been much inspired by the judgment of Mohd Azmi FCJ in *Wong Yuen Hock (supra)*. I also find support for the view I take of the law from the following passage in the judgment of Bhagwati J (later Chief Justice of the Indian Supreme Court) in *Workmen of Syndicate Bank, Madras v. Government of India* [1984] 1 SCLJ 685:

> We are of the view that the ground on which the Government of India has refused to refer the dispute relating to the imposition of punishment of stoppage of three increments on Shri Murugavelu to the Industrial Tribunal is not a valid ground. It would not be right for the Government of India to refuse to make the reference on the ground that the charges of misconduct against the worker were proved during a duly constituted departmental inquiry and penalty was imposed on the worker after following the required procedure. If such a ground were permissible it would be the easiest thing for the management to avoid a reference to adjudication and to deprive the worker of the opportunity of having the dispute referred for adjudication even if the order holding the charges of misconduct proved was unreasonable or perverse or was actuated by *mala fides,* or even if the penalty imposed on the worker was totally disproportionate to the offence said to have been proved. The management has simply to show that it has held a proper inquiry after complying with the requisite procedure and that would be enough to defeat the workers claim for adjudication. Such a situation cannot be countenanced by law.

The authorities thus far cited, tell against so much of the appellant's third submission as contends for the relevance and importance of the domestic inquiry that was held in this case. I have therefore no difficulty in rejecting it as being devoid of merit.

Duty to Give Reasons

(A) Under English Common Law

By the common law of England, a public decision-taker is, for historical reasons, not under an obligation to provide reasons for his decisions. The principle and its rationale have been succinctly stated in J*udicial Review of Administrative Action* by De Smith, Woolf and Jowell, 5th Edn., at p. 457 as follows:

> It has long been a commonly recited proposition of English law that there is no general rule of law that reasons should be given for administrative decisions. On this view, a decision-maker is not normally required to consider whether fairness or natural justice demands that reasons should be provided to an individual affected by a decision. This is because the giving of reasons has not been considered to be a requirement of the rules of procedural propriety.
>
> The absence of a duty to give reasons has sometimes been explained as following from the fact that the Courts themselves are not obliged at common law to give reasons for their decisions.

Inroads have, however, been made into the rigid doctrine of the common law. The most notable of these is *Breen v. Amalgamated Engineering Union* [1971] 2 QB 175, where Lord Denning MR, in a minority judgment, accorded recognition to the importance of giving a reasoned decision in words that merit recollection:

> Then comes the problem: ought such a body, statutory or domestic, to give reasons for its decision or to give the person concerned a chance of being heard? Not always, but sometimes. It all depends on what is fair in the circumstances. If a man seeks a privilege to which he has no particular claim – such as an appointment to some post or other – then he can be turned away without a word. He need not be heard. No explanation need be given: see the cases cited in *Schmidt v. Secretary of State for Home Affairs* [1969] 2 Ch. 149, 170-171. *But if he is a man whose property is at stake, or who is being deprived of his livelihood, then reasons should be given why he is being turned down, and he should be given a chance to be heard. I go further. If he is a man who has some right or interest, or some legitimate expectation, of which it would not be fair to deprive him without a hearing, or reasons given, then these should be afforded him, according as the case may demand. The giving of reasons is one of the fundamentals of good administration.* Again take *Padfield's* case [1968] AC 997. The dairy farmers had no right to have their complaint referred to a committee of investigation, but they had a legitimate expectation that it would be. The House made it clear that if the Minister rejected their request without reason, the Court might infer that he had no good reason: and, that if he gave a bad reason, it might vitiate his decision. (Emphasis added.)

The basis for the existence of a doctrine, founded upon an historical accident of Courts not being under an obligation to furnish reasoned decisions and therefore being unwilling to impose any higher duty upon other public decision-makers, has, for all practical purposes ceased to exist. The present position is summarised in the following passage in the judgment of Grifftihs LJ in *R. v. Knightsbridge Crown Court, ex parte International Sporting Club (London) Ltd.* [1982] QB 304:

> It is the function of professional Judges to give reasons for their decisions and the decisions to which they are a party. This Court would look askance at the refusal by a judge to give reasons for a decision particularly if requested to do

> so by one of the parties ... it may well be that if such a case should arise this Court would find that it had power to order the Judge to give his reasons for his decision.

It is now well-settled that a Judge should set out his reasons when handing down decisions on facts or law. If he does not do so, his decision may be quashed and remitted for a rehearing. See, *Eagil Trust Co. v. Pigott-Brown* [1985] 3 All ER 119, 122; *R. v. Crown Court at Harrow, ex parte Dave* [1994] 1 WLR 98.

The proposition that a public decision-taker is under no obligation to give reasons for his decision has been qualified in two fairly recent cases.

The first of these is *R. v. Civil Service Appeal Board, ex parte Cunningham* [1991] 4 All ER 310. I consider the following extract from the judgment of Lord Donaldson to be relevant:

> There are three possible bases for holding that the board should have given reasons for their award. The first is that there is a general rule of the common law or, if that be different, a principle of natural justice that a public law authority should always or even usually give reasons for its decisions. I am not sure to what extent this was advanced before Otton J, but he rejected it decisively. Suffice it to say that the proposition is unarguable and it was not argued in this Court. If authority be needed it is provided by the decision of the High Court of Australia in *Public Service Board of New South Wales v. Osmond* [1987] LRC (Const) 681, and the English and other Commonwealth cases there cited. I would only comment that, although Gibbs CJ may be right in saying (at p. 688) that s. 12 of the Tribunals and Inquiries Act 1971 applied to the decisions of Industrial Tribunals exercising their jurisdiction under the Industrial Relations Act 1971 as distinct from their jurisdiction under the Industrial Training Act 1964, this never occurred to anyone at the time and the decisions in *Norton Tool Co. Ltd. v. Tewson* [1973] 1 All ER 183, [1973] 1 WLR 45 and *Alexander Machinery (Dudley) Ltd. v. Crabtree* [1974] ICR 120 were not based on any such consideration.
>
> The second is that a tribunal exercising a jurisdiction which mirrors that of the Industrial Tribunals which are required to give reasons and further or alternatively a tribunal which is exercising a judicial function from which there is no appeal should give sufficient reasons to enable a party to know why he has failed to secure any or, as the case may be, all of the relief which he sought and above all to be satisfied that the decision was lawful. This Otton J rejected.
>
> The third is that Mr. Cunningham and others who resort to the board have a legitimate expectation that it will give reasons. This, as I have shown, the Judge accepted.
>
> I take it as established that the remit and authority of the board is to adjudicate upon the issue of whether a dismissal was fair or unfair and, if unfair, on the appropriate amount of compensation, applying the same approach as would be appropriate on an application of the Employment Protection (Consolidation) Act

1978. No other basis for its decisions has been suggested and the whole concept of an unfair dismissal and compensation for such dismissal is a creature of that Act and its predecessors.

That being so, the issue is whether natural justice, or 'fairness in action' as it has been called, requires that some and, if so, what reasons be given for its decisions.

I accept at once that some judicial decisions do not call for reasons, the commonest and most outstanding being those of magistrates. However, they are distinguishable from decisions by the board for two reasons. First, there is a right of appeal to the Crown Court, which hears the matter *de novo* and customarily does give reasons for its decisions. Second, there is a right to require the Magistrates to state a case for the opinion of the High Court on any question of law. This right would enable an aggrieved party to know whether he had grounds for raising any issue which would found an application for judicial review, although his remedy would procedurally be different.

I accept that the various decisions requiring industrial tribunals to give reasons and indicating the extent of the reasons appropriate have to be read in the context that Parliament has given the parties a right of appeal to the Employment Appeal Tribunal (in succession to the National Industrial Relations Court) on questions of law and the reasoning is based upon the entitlement of the parties to know whether a question of law arises.

I accept that many tribunals, including the Immigration Appeal Tribunal, are required by statute law to give reasons and to that extent the position of the board is distinguishable.

I accept that however desirable it may be that decision-makers shall give reasons, and even more essential that they shall have them and know what they are, that is not the same as being required by statute or the common law to communicate such reasons to those affected. *However, I do not accept that, just because Parliament has ruled that some tribunals should be required to give reasons for their decisions, it follows that the common law is unable to impose a similar requirement upon other tribunals, if justice so requires.* As Lord Bridge put it in *Lloyd v. McMahon* [1987] 1 All ER 1118 at 1161, [1987] 1 AC 625 at pp. 702-703:

> My Lords, the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular, it is well established that when a statute has conferred on any body the power to make decisions affecting individuals, the Courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness.

Accordingly, I take as my starting point a consideration of what is 'the character of the decision-making body'. The answer is that it is not domestic. In this it is to be distinguished from internal appeal bodies dealing with industrial relations problems, including dismissals, in large companies or private organisations. Whether the board is dealing with prison officers, who do not have access to industrial tribunals, or with other Crown employees who do, it is an independent public law body wholly divorced from management, albeit established by the Crown. Nor is it in any way administrative or even quasi-judicial. It is a fully judicial body.

I then have to consider the framework in which it operates. It is unaffected by statute. It gives decisions which in practice determine rights as between the Crown and its employees. That some Crown employees may have additional rights is immaterial.

There is no appeal from its decisions on either fact or law, but it is obliged to exercise its functions in accordance with the law and, for reasons which I have already given, in accordance with, albeit not under, the Employment Protection (Consolidation) Act 1978.

I then ask myself what additional procedural safeguards are required to ensure the attainment of fairness. The answer is, I believe, to be found in the judgment of Lord Lane CJ in *R v. Immigration Appeal Tribunal, ex parte Khan (Mahmud)* [1983] 2 All ER 420 at p. 423; [1983] QB 790 at pp. 794-795, which I do not believe owed anything to the fact that the Immigration Appeal Tribunal is required by statute to give some reasons for its decisions:

> The important matter which must be borne in mind by tribunals in the present type of circumstances is that it must be apparent from what they state by way of reasons first of all that they have considered the point which is at issue between the parties, and they should indicate the evidence upon which they have come to their conclusions. Where one gets a decision of a tribunal which either falls to set out the issue which the tribunal is determining either directly or by inference, or fails either directly or by inference to set out the basis on which it has reached its determination on that issue, then that is a matter which will be very closely regarded by this Court, and in normal circumstances will result in the decision of the tribunal being quashed. The reason is this. A party appearing before a tribunal is entitled to know, either expressly stated by it or inferentially stated, what it is to which the tribunal is addressing its mind. In some cases it may be perfectly obvious without any express reference to it by the tribunal; in other cases it may not. Second, the appellant is entitled to know the basis of fact on which the conclusion has been reached. Once again in many cases it may be quite obvious without the necessity of expressly stating it, in other cases it may not.

Judged by that standard the board should have given outline reasons sufficient to show to what they were directing their mind and thereby indirectly showing not whether their decision was right or wrong, which is a matter solely for them, but whether their decision was lawful. Any other conclusion would reduce the board to the status of a free-wheeling palm tree.

> The board's objection to giving reasons, which curiously is fully supported by both the official and the staff sides, is that this would tend to militate against informality and would lead to an undesirable reliance upon a body of precedent. I find this totally unconvincing. The evidence shows that those who advise applicants and departments do so frequently and must be well aware of the board's previous decisions and of the circumstances in which they were made. There must therefore already be a body of precedent. If the board have no regard to their previous decisions, they must be acting inconsistently and be failing to do justice as between applicants. This I am loathe to believe. As to informality, no one has yet complained that the industrial tribunals lack informality, yet they give reasons for their decisions. A complaint of legalism is another matter, but there is no reason why the giving of brief reasons should lead to this most distressing of diseases. (Emphasis added.)

The second is the decision of the House of Lords in *R. v. Secretary of State for the Home Department, ex parte Doody* [1993] 3 WLR 154, where Lord Mustill, in the following passage (at p. 172), approved the approach adopted by the Master of the Rolls in *Cunningham*:

> I accept without hesitation, and mention it only to avoid misunderstanding, that the law does not at present recognise a general duty to give reasons for an administrative decision. Nevertheless, it is equally beyond question that such a duty may in appropriate circumstances be implied, and I agree with the analyses by the Court of Appeal in *Reg. v. Civil Service Appeal Board, ex parte Cunningham* [1991] 4 All ER 310 of the factors which will often be material to such an implication.

So much for the English common law.

I now turn to consider how our Courts have approached the question.

(B) The Position at Malaysian Common Law

Before embarking upon an examination of the decisions of Malaysian Courts upon the subject, I must make mention of an important policy consideration which sets our common law apart from that of England. It is this.

I said a moment ago that the principle of the common law of England which imposes no obligation upon a public decision-maker to give reasons is based upon the historical premise that Courts there were under no obligation to give reasons for their decisions. English Courts therefore declined to impose upon other public decision-makers a standard higher than that which they (the Courts) were required to meet.

But that is not the position in this country. Here, it has long been considered a duty of Courts to produce reasons for their decisions. See, for example, the judgment of Ismail Khan J (as he then was) in *Balasingham v. Public Prosecutor* [1959] MLJ 193 in relation to the statutory duty imposed upon

Subordinate Courts to give reasons in criminal cases. This, of course is exactly opposite to the position in England, where Magistrates are, even today, not required to give reasons for their decisions.

The judicial policy whereby a judge is duty bound to give reasons for his decisions was expressly declared by Azim LP in the *Rukun Keadilan*, or *Principles of Justice*. See [1971] 2 MLJ xliii. It is only very recently that the policy has received constitutional sanction. That sanction is to be found in Art. 125(3A) of the Federal Constitution. *The Judges' Code of Ethics* to which cl. 3A of the Article refers was published in the *Gazette* on 2 December 1994. Among other matters, it proscribes a judge from "inordinately and without reasonable explanation delay in the disposal of cases, the delivery of decisions and the writing of grounds of judgment". And, Art. 125(3) (as does the Code) provides, *inter alia,* that a Judge may be removed from office "on the ground of any breach of any provision of the code of ethics ..."

So it comes to this. In England, a Judge who hands down a decision without providing reasons may be reversed and a retrial of the cause ordered. An identical situation in this country may result in the removal of the errant Judge from office.

Since our Courts have had imposed upon themselves a standard very much higher than the Courts of England, it is difficult to comprehend the relevance or applicability of English authorities which decide that a public decision-maker need not give a reasoned decision. Further, it may be legitimately asked of other public decision-takers in this country, why, if a Judge has to give reasons for his decision, the like duty ought not be imposed upon them based upon the principle of equality.

With that, I now turn to examine the decisions of our Courts which I find disclose a marked division of opinion upon the point.

In *Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang v. Kam Gin Paik & Ors.* [1983] 2 MLJ 390, the Federal Court held that in cases under the Land Acquisition Act 1960, the collector is not obliged to give reasons for his award of compensation. See, in particular, the judgment of Hashim Yeop A. Sani FJ, at p. 394 of the report.

However, in *Government of Malaysia & Ors. v. Loh Wai Kong* [1979] 2 MLJ 33, Suffian LP while holding that a citizen has no fundamental right to leave the country, cited the following passage from the minority judgment of Hidayatullah J in *Satwant Singh Sawhney v. D. Ramarathnam* AIR [1967] SC 1836, 1843 with tacit approval:

> A person is ordinarily entitled to a passport unless, **for reasons which can be established to the satisfaction of the Court,** the passport can be validly refused to him. Since an aggrieved party can always ask for mandamus, if he is treated

> unfairly, it is not open, by straining the constitution, to create an absolute and fundamental right to a passport where none exists in the constitution. There is no doubt a fundamental right to equality in the matter of grant of passport (subject to reasonable classification) but there is no fundamental right to travel abroad or to the grant of passport. A passport is a political document. The solution of a law of passport will not make things better. Even if a law were to be made the position would hardly change because the utmost discretion will have to be allowed to decide upon the worth of an applicant. Where the passport authority is proved to be wrong, mandamus will always set right the matter.

The Lord President then went on to say as follows:

> We have already expressed the view that a citizen has no fundamental right to leave the country and travel abroad, and here we would say that in our view he does not have a right, not even a qualified right, to a passport, though we must further add that in our view, though the citizen does not have a right under our constitution and our law to a passport, **the Government should act fairly and *bona fide* when considering applications for a new passport or for the renewal of a passport** and should, like Government in the United Kingdom, rarely refuse to grant them.
>
> ...
>
> [I]n our judgment when exercising this discretionary power the executive is expected to behave in the same way as when exercising its other discretionary powers. It must act *bona fide,* fairly, honestly and honourably, and if it does not, the aggrieved party will probably make a noise in the press, in Parliament and in public. What if he comes to Court? If it is established that Government has acted *mala fide* or **has in other ways abused this discretionary power,** the Court may, in our judgment, review Government's action and make the appropriate order, and the principles which the Court will apply are well-established and may be found in two authoritative books: *Administrative Law* by Professor H.W.P. Wade, and *Judicial Review of Administrative Action* by the late Professor de Smith. (Emphasis added.)

The decision in *Loh Wai Kong* may thus be seen to support the view that an administrative authority in whom Parliament confers a discretion ought to give reasons that would stand up to objective scrutiny when it makes a decision in the exercise of that discretion.

The next case that calls for discussion is *Pahang South Union Omnibus Co. Bhd. v. Minister of Labour and Manpower & Anor.* [1981] 2 MLJ 199. There, what fell to be considered was the Minister's decision to accord recognition to a trade union which claimed to represent the workmen of the appellant company. The company's application to have the Minister's decision quashed having failed, it appealed to the Federal Court which dismissed the appeal. Abdoolcader J (as he then was), when delivering the judgment of the Federal Court applied with approval the following passage in the judgment of Lord Denning MR in *General Electric Co. Ltd. v. Price Commission* [1975] ICR 1, 12:

Parliament often entrusts the decision of a matter to a specified person or body, without providing for any appeal. It may be a judicial decision, or a quasi-judicial decision, or an administrative decision. Sometimes Parliament says its decision is to be final.

At other times it says nothing about it. In all these cases the Courts will not themselves take the place of the body to whom Parliament has entrusted the decision. The Courts will not themselves make the original findings of fact. They will not themselves embark on a rehearing of the matter: see *Healey v. Minister of Health* [1955] 1 QB 221. But, nevertheless, the Courts will, if called upon, act in a supervisory capacity. They will see that the decision-making body acts fairly: see In *Re H.K. (An Infant)* [1967] 2 QB 617, 630; *Reg. v. Gaming Board for Great Britain, ex parte Benaim and Khaida* [1970] 2 QB 417. The Courts will ensure that the body acts in accordance with the law. If a question arises on the interpretation of words, the Courts will decide it by declaring what is the correct interpretation: see *Punton v. Ministry of Pensions and National Insurance* [1963] 1 WLR 186. And if the decision-making body has gone wrong in its interpretation, they can set its order aside: see *Ashbridge Investments Ltd. v. Minister of Housing and Local Government* [1965] 1 WLR 1320. (I know of some expressions to the contrary, but they are not correct.) If the decision-making body is influenced by considerations which ought not to influence it; or fails to take into account matters which it ought to take into account, the Court will interfere: see *Padfield v. Minister of Agriculture, Fisheries and Food* [19681 AC 997, 1007, 1061. If the decision-making body comes to its decision on no evidence or comes to an unreasonable finding – so unreasonable that a reasonable person would not have come to it – then again the Courts will interfere: see *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223. If the decision-making body goes outside its powers, or misconstrues the extent of its powers, then, too, the Courts can interfere: see *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 AC 147. And, of course, if the body acts in bad faith or for an ulterior object, which is not authorised by law, its decision will be set aside: see *Sydney Municipal Council v. Campbell* [1925] AC 338. In exercising these powers, the Courts will take into account any reasons which the body may give for its decisions. **If it gives no reasons – in a case when it may reasonably be expected to do so, the Courts may infer that it has no good reason for reaching its conclusion, and act accordingly:** see *Padfield's* case. (Emphasis added.)

I now turn to consider *Rohana bte Ariffin & Anor. v. Universiti Sains Malaysia* [1989] 1 MLJ 487, which, in my view, is a landmark decision in the field of administrative law. There, Edgar Joseph Jr. J (as he then was) dealt with the issue in this way:

I must next consider another objection taken by the applicants. It was submitted that the law has developed to a stage where there is a general duty to provide reasons even when the relevant authority act in a quasi-judicial matter. In support, the following passage in the judgment of Bhagwati J (as he then was) in *Siemens Engineering & Manufacturing Co. v. Union of India* AIR [1976] SC 1785 was cited:

> It is now settled law that where an authority makes an order in exercise of a quasi-judicial function, it must record its reasons in support of the order it makes. Every quasi-judicial order must be supported by reasons.
>
> The rule requiring reasons to be given in support an order is, like the principle of *audi alteram partem*, a basic principle of natural justice which must inform every quasi-judicial process ... .

With great respect to Bhagwati J, I consider that if the requirement for reasons is essential for every quasi-judicial order, then it would place administrative bodies in a very difficult position.

> But, having said that, I accept that there are certain cases where reasons for decision should be given particularly when there is a right of appeal, since an appeal is merely a continuation of proceedings by way of rehearing and litigants as well as the appellate tribunal are entitled to know the reasons for the finding.

The learned Judge having referred to the decision in *Breen (supra)* said:

> In the present case, it was argued, and I agree, that in a university environment, the exercise of reason and intellect are encouraged. The applicants are academics and should be told of the scope of free speech and interaction with students and why their defences were rejected. The giving of reasons for decision in a situation such as this would also serve as a guide to other academics in the position of the applicants. Moreover, the applicants' livelihood was at stake.

His Lordship then quoted the passage in the judgment of the Master of the Rolls in *Breen* which I have reproduced earlier in this judgment and went on to say as follows:

> In certain circumstances, which I have endeavoured to indicate, a reasoned decision can be an additional constituent of the concept of fairness. I am satisfied that having regard to all the circumstances the present case was such a case. The applicants are also entitled to succeed on this ground since neither the disciplinary authority nor the university council gave any reasons for their decision.

Encik Sivabalah argues that the principle enunciated by Edgar Joseph Jr. J in the foregoing passages is confined to cases where the power under review is quasi-judicial. He says that it does not apply to the present case because the function under review here is administrative, not quasi-judicial.

The answer to Counsel's argument lies, I think, in the way in which administrative law has developed, particularly in the area of judicial review of administrative discretion. This has indeed been recognised by our Courts.

In *Merdeka University Bhd. v. Government of Malaysia* [1982] 2 MLJ 243, 246, Suffian LP, speaking of the discretion conferred upon His Majesty the Yang di-Pertuan Agong by s. 6 of the University and University Colleges Act 1971 said:

> It will be noted that s. 6 used the formula 'If the Yang di-Pertuan Agong is satisfied etc.' In the past such a subjective formula would have barred the Courts from going behind His Majesty's reasons for his decision to reject the plaintiff's application; but, as stated by the learned Judge, administrative law has since so far advanced such that today such a subjective formula no longer excludes judicial review if objective facts have to be ascertained before arriving at such satisfaction and the test of unreasonableness is not whether a particular person considers a particular course unreasonable, but whether it could be said that no reasonable person could consider that course reasonable ....

The original approach to the judicial review of administrative powers lay in the Atkin test: the question to be asked in any given case being whether the authority whose act or decision is challenged was under a duty to act judicially. (See *R. v. Electricity Commissioners* [1924] 1 KB 171).

This approach pervaded the law for more than forty years. Then, in 1967, it was discarded. The question that was to be asked became whether the particular functionary was under a duty to act fairly. (See the judgment of Lord Parker CJ in *Re H.K. (An infant)* [1967] 2 QB 617.) This test held the field for about 20 years. It was then jettisoned and replaced by the concept of procedural propriety. (See the speech of Lord Diplock in *Council* of *Civil Service Unions v. Minister for the Civil Service* [1985] AC 374.) The current approach is that laid down by Edgar Joseph Jr. J, in *Rohana (supra)*, namely, whether procedural fairness was meted out in a particular case.

I pause to add that our Courts have in the development of administrative law been considerably influenced by the decisions of English Courts. While the decisions of English Courts are of undoubted utility, it must not be forgotten that they are reached without the benefit of a written constitution. Much the same may be said of decisions emanating from Australia and New Zealand where there are absent any provisions resembling our Arts. 5(1) and 8(1).

We on the other hand have the Federal Constitution which declares itself as the supreme law of the Federation. I am therefore of the view that while the decisions of the Courts of these countries may be useful guides, we ought not to slavishly follow them in disregard to the provisions of the Federal Constitution. I think that our Courts owe it to those who won us our freedom from the colonial yoke and gave to us an activist and dynamic written constitution, to decide issues of public law by reference to that supreme law, using as our primary guides, decisions of Courts of countries which have constitutional provisions akin to our own. But when we do so, we should also bear in mind any difference in language between like provisions in the respective constitutions. Regard should also be had to the national ethos, our own cultural background and the larger objective which a democratically elected Government is seeking to achieve. For a constitution is a living document, and

the concepts it houses in broad and liberal language must perforce be interpreted broadly and liberally in accordance with the particular needs of a developing society.

However eminent an English or an Australian Judge may be, it is not to be forgotten that the views he expresses are coloured by the needs of the society of which he is a member. We, on the other hand, have to address the needs of a society quite differently structured, with different aspirations based on an entirely different set of values. Our Courts should therefore adopt an approach that is best suited to our own needs and values paying such respect as is due to the approach adopted by the Courts of countries whose values upon particular subjects may be at variance with our own.

I have made these observations in order to emphasise the existence in the Federal Constitution of provisions, such as Arts. 5(1) and 8(1), which are of wide import and contain principles that are capable of meeting any issue of public law that arises for decision. The combined effect of these two Articles is to require all State action to be fair and just; and they strike at arbitrariness even in the discharge of administrative functions. Procedural fairness is accordingly part of our law, not by reason of the application of English cases, but because of the terms of Arts. 5(1) and 8(1). See, *Raja Abdul Malek Muzaffar Shah v. Setiausaha Suruhanjaya Pasukan Polis* [1995] 1 CLJ 619; [1995] 1 MLJ 308; *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor (supra).*

Whether procedural fairness is required in a particular case depends upon the nature of the subject-matter under review. The extent of the fairness that is to be meted out in a particular case, depends upon the peculiar facts and circumstances of that case. These points have been stated with so much clarity in *Rohana (supra)* that they need no further emphasis or elaboration here.

Even the law as it stood in the early stages of its development appears to provide an adequate answer to the argument put forward by Counsel. I refer, of course, to the judgment of Abdoolcader J (as he then was) in *Mak Sik Kwong v. Minister of Home Affairs, Malaysia (No. 1)* [1975] 2 MLJ 168, in which appears (at p. 172) the following summary of the law:

> Certiorari and prohibition may now issue in proper cases to a body which exercises functions that are analytically and ostensibly administrative and which is not even required to act judicially in the performance of those functions (*Ridge v. Baldwin* [1964] AC 40). The obligation to act judicially in accordance with the principles of impartiality and fairness may be incurred by a body exercising discretionary administrative powers which seriously encroach on individual interests (*Durayappah v. Fernando* [1967] 2 AC 337). In *Rex v. Woodhouse* [1906] 2 KB 501, Fletcher Moulton LJ in his judgment (at p. 535) stated that it is well established that certiorari will issue to a body which would not ordinarily be

called a Court nor would its acts ordinarily be termed 'judicial acts' and that in this context the term 'judicial act' is used in contrast with purely ministerial acts. He went on to state that in general a judicial act was one which involved 'the exercise of some right or duty to decide' a question affecting individual rights 'in order to provide scope for a writ of certiorari at common law.'

It has also been held that it is enough in order for certiorari or prohibition to lie for the competent authority to be under a duty to act fairly (*Reg. v. Liverpool Corporation, ex parte Liverpool Taxi Fleet Operators' Association* [1972] 2 QB 299 – a leading case on the implied duty to act fairly). In *Reg. v. Birmingham City Justice, ex parte Chris Foreign Foods (Wholesalers) Ltd.* [1970] 1 WLR 1428, Lord Parker CJ stated (at p. 1433) that a justice acting under the procedure of the Food and Drugs Act 1955, even though acting in an administrative or executive capacity, was obliged to act fairly and impartially.

It would seem therefore no longer necessary to show that the function was essentially of a judicial nature *(Ridge v. Baldwin; Durayappah v. Fernando)* or that the person or body making the decision was under an express or even an implied duty to follow a procedure analogous to the judicial (*R. v. Manchester Legal Aid Committee, ex parte Brand (R.A) & Co. Ltd.* [1952] 2 QB 413. It will be sufficient if there is an obligation to decide questions of law or fact affecting individual rights and exercise a judicial or limited discretion *(ibid)*. A purely administrative or executive function is one where there is no duty to afford a hearing to the parties interested, and where the decision can be made on the basis of policy considerations only.

Even in arriving at an administrative decision, there may be a judicial or quasi-judicial interlude, and at that stage the deciding authority will have to act in a quasi-judicial manner – a situation resolving in effect into a hybrid mixture of administrative and quasi-judicial functions where the two elements are intermingled closely. (Emphasis added.)

If the fact pattern in *Mak Sik Kwong (No. 1)* were to occur today, the case would, in my judgment, be decided on the basis that the Minister in that case was under a duty to accord procedural fairness to the applicant Mak in accordance with the principle established by the decision in *Rohana (supra).*

I now turn to the two decisions relied upon by the appellant and the Minister for contending that no reasons need be furnished when the discretion conferred by s. 20(3) is exercised.

The first of these is *Minister of Labour, Malaysia v. Sanjiv Oberoi & Anor.* [1990] 1 CLJ 44; [1990] 1 MLJ 112, the facts of which were as follows. Oberoi was an employee of Genting Bhd. His services were terminated in accordance with the terms of the contract under which he was employed.

Considering himself to have been dismissed without just cause or excuse, he made representations to the Director-General under s. 20(1) of the Act. In due course the Director-General reported to the Minister who declined to refer the representations to the Industrial Court for an award. Oberoi then moved

the High Court for an order of certiorari to quash the Minister's decision. After hearing arguments, the judge made an order directing the Minister to file a further affidavit disclosing his reasons for not referring the matter to the Industrial Court. He then adjourned further hearing of the substantive motion. The Minister appealed against the order directing him to furnish reasons. The Supreme Court allowed the appeal. Abdul Hamid LP who delivered the judgment of the Court said:

> As for the learned Judge's order to file further affidavit, we are of the view that the order for further affidavit should only be given in accordance with and under the circumstances permitted under the Rules of the High Court 1980. The learned Judge's order amounted to a direction about evidence. The authority on this point is clear in that 'the Court cannot give a direction about evidence unless all the litigants desire such direction to be made'. (See *Tay Bok Choon v. Tahansan Sdn. Bhd.* [1987] 1 MLJ 433 at p. 436 per Lord Templeman.)
>
> As for this appeal, we are of the view that on the evidence in this case the Minister of Labour had not acted unreasonably. There is no evidence that the Minister had acted in bad faith or that he was biased against Sanjiv Oberoi. **The Minister of Labour is not required to give any reasons when he exercises his discretion under s. 20(3) of the Industrial Relations Act 1967.** We hold therefore that the learned trial Judge's direction that the appellant give reasons for not referring Sanjiv Oberoi's representations to the Industrial Court was not justified and we accordingly allow the appeal with costs. (Emphasis added.)

It is to be noted at once that the Supreme Court was dealing with the case purely upon a procedural point concerning the direction to file a further affidavit disclosing reasons for the Minister's refusal to refer. The reference to *Tay Bok Choon* by the learned Lord President confirms this to be indeed the case. It was in that context that the Supreme Court spoke, *en passant,* of there being no duty upon the Minister to provide reasons when acting under s. 20(3) of the Act. Having read and re-read the judgment of the Supreme Court, I am satisfied that the point that has arisen so acutely for decision in these appeals as a matter of substantive law did not arise for decision in *Oberoi.*

The second authority relied upon is *Chan Meng Yuen (supra)*, which I have discussed earlier in this judgment when considering the Hashim Yeop test. The judgment of Harun Hashim SCJ to which we were referred contains the following passage:

> The next question is whether the Minister is required to give his reasons when challenged in certiorari proceedings. During the course of argument, several cases were cited to us but they were all cases where the Minister had given his reasons: see e.g. *Minister of Labour, Malaysia v. National Union of Journalists, Malaysia and Anor. Appeal.* What is clear from the decided cases, however, is that **the Courts cannot compel the Minister to give reasons for his decision where there is no duty to do so:** *Minister of Labour, Malaysia v. Sanjiv Oberoi & Anor.* Indeed in *R v. Northumberland Compensation Appeal Tribunal, ex parte Shaw* [1952] 1 KB 338, Lord Denning at p. 352 said:

> I think the record must contain at least the document which initiates the proceedings; the pleadings, if any; and the adjudication; but not the evidence, nor the reasons, unless the tribunal chooses to incorporate them. If the tribunal does state its reasons, and those reasons are wrong in law, certiorari lies to quash the decision. (Emphasis supplied.)

In *R v. Secretary of State for Trade and Industry, ex parte Lonrho plc* [1989] 1 WLR 525, Lord Keith of Kinkel in the House of Lords said at p. 529:

> The absence of reasons for a decision where there is no duty to give them cannot of itself provide any support for the suggested irrationality of the decision. The only significance of the absence of reasons is that if all other known facts and circumstances appear to point overwhelmingly in favour of a different decision, the decision-maker, who has given no reasons, cannot complain if the Court draws the inference that he had no rational reason for his decision.

On what facts and circumstances should a judicial review Court rely when deciding whether the Minister has exercised his discretion according to law? **In like cases as the present, the real contesting parties are the employer and the workman.** Both sides have presented their version of the case to the Court which cannot be any different from that laid before the Director-General of Industrial Relations and the Minister. That is the only material which the Court has to consider. In the present case, there is only the bare allegation that the Minister has acted unreasonably because he has not given reasons for his decision. That is not enough.

The respondent must show that the Minister acted unreasonably: *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223, or that he acted in bad faith: *Cannock Chase District Council v. Kelly* [1978] 1 WLR 1. There is no such evidence here.

It was urged before us that in exercising his discretion under s. 20(3) of the Act, policy decisions come into play and following *National Union of Hotel, Bar & Restaurant Workers v. Minister of Labour and Manpower* [1980] 2 MLJ 189, the Courts should not interfere. In that case the Minister gave his reasons. He has not done so here but it was suggested by the learned senior federal Counsel who appeared for the Minister that the policy decision was that as there is an alternative remedy available to the respondent to seek relief in the civil Court the Minister has acted reasonably. That may be so but the Minister has not said so and we cannot accept a statement from the Bar as being the reason the Minister had in arriving at his decision. We can only look at the facts as stated in the affidavits before the Court. (Emphasis added.)

Encik Sivabalah and Cik Haliza both say that this Court is bound by these views in accordance with the doctrine of *stare decisis*. They add that since the Minister is under no duty to furnish reasons and may not be compelled to do so, no adverse conclusion ought to be drawn from his failure to furnish reasons in the present case.

These arguments have caused me some anxiety. However, having considered the relevant authorities with great care, I must express my inability to agree with the submissions of Counsel. My reasons are as follows.

First, a reading of *Chan Meng Yuen*, reveals that it was not relevant for the decision in that case for the Supreme Court to determine whether the Minister was under an obligation to give reasons for his decision. Subsequent passages in the judgment of Harun SCJ which I have earlier quoted when discussing the application of the "Hashim Yeop test" bear this out.

As may be recalled, the Supreme Court took the view that the facts as disclosed in the affidavits required scrutiny in order to determine whether the Minister had acted reasonably. But that is an approach which stands apart from the unrelated question whether the Minister ought to give reasons, or, in the words of Lord Denning MR in *General Electric (supra),* "may reasonably be expected to do so." The Supreme Court could, with respect, have reached the conclusion it did without having to decide the point now under discussion.

In the light of the foregoing, I am satisfied that the observation by the Supreme Court upon the question was purely *obiter* and without binding effect.

Secondly, it is clear, with respect, that the Supreme Court, in reliance upon *Sanjiv Oberoi*, formulated a proposition wider in terms than warranted by actual decision in that case. To reiterate, what *Oberoi* decides is that as a matter of pure civil procedure, a Court may not give evidential directions in a case on the basis that parties have control over the presentation of their respective cases.

Thirdly, the statement about the real contestants being the employer and the workman, does not, with respect, reflect the true position in law. Where the Minister's exercise of discretion is challenged, the issue at stake is whether there is legal justification for the refusal to refer. It is the Minister's decision that is called into question and not the employer's.

Fourthly, neither the decision in *Rohana (supra)* nor the cases cited therein appear to have been brought to the attention of the Supreme Court. Further, the judgment of Suffian LP in *Loh Wai Kong* and that of Abdoolcader J, in *Pahang South Union Omnibus (supra)* also appear not to have been cited, or if cited, not discussed.

Fifthly, it is to be noted that the views expressed by Lord Denning in *Ex parte Shaw* were departed from by him in *Breen* and in *General Electric.* This certainly deprives the passage in the earlier decision, relied upon by the Supreme Court, of much weight. Again, it does seem that this change of view was not drawn to the attention of the Supreme Court.

Sixthly, when the speech of Lord Keith in *Lonhro* was delivered, neither *Cunningham* nor *Doody* had been decided. The decision in *Lonhro* must I think, now be read in the light of the pronouncement in *Doody.*

Seventhly, the decision of the Supreme Court, with respect, appears to have been largely based upon English authorities without bearing in mind the historical antecedent to the rule upon which they are based and to which I have already made reference. The judicial policy by which our Court are guided is, as I have pointed out, at variance with that obtaining in England.

Lastly, it does not appear that the width and reach of Arts. 5(1) and 8(1) were ever raised and argued at the Bar of the Supreme Court. Further, the relevant authorities that have discussed the equipollent provisions in India do not appear to have been cited.

In the light of the foregoing, and faced with the opinions expressed in *Loh Wai Kong, Pahang South Union Omnibus* and *Rohana* on the one hand and the opposite view expressed in *Chan Meng Yuen* on the other, this Court is free to act in the matter of choice of precedents. I would therefore readily express my preference for the views expressed in the former and respectfully decline to follow the latter.

In my judgment, as a general rule, procedural fairness, which includes the giving of reasons for a decision, must be extended to **all** cases where a fundamental liberty guaranteed by the Federal Constitution is adversely affected in consequence of a decision taken by a public decision-maker. Whether a particular right is a fundamental liberty and therefore falls within the wide encompass of any of the Articles under Part II of the Federal Constitution is a question that has to be dealt with on a case by case basis. Suffice to say that the instant appeals are concerned with a fundamental liberty.

I have expressed the extent and content of procedural fairness in general terms because cases may and do occur where it may be not be feasible or desirable to accord any procedural fairness or, alternatively, the full breadth of procedural fairness in respect of a decision which may adversely affect those rights of which I have spoken.

Land acquisition cases best illustrate the feasibility postulate. If the constitutional requirement of procedural fairness is insisted upon in every case where property is acquired through State action, public administration would grind to a halt as would the development of the country. It would result in the necessity of holding an inquiry to determine the propriety of acquisition even in a case where a few square feet of land is required to widen a public thoroughfare. In recognition of the disastrous consequences that would ensue from an inflexible approach, Parliament has properly confined the right to procedural fairness to the issue of adequate compensation in cases where private property is acquired by the State. The decision of the Federal Court in *S. Kulasingam*

& Anor. v. Commissioner of Lands, Federal Territory & Ors. [1982] 1 MLJ 204 exemplifies the need for maintaining the feasibility restriction in the field of procedural fairness.

Again, national security, public safety or public interest are considerations that may exclude procedural fairness in a particular case. The burden of showing that reasons for a decision ought not to be given lies, of course, upon the public decision-taker. And his mere *ipse dixit* upon the question is inconclusive. There must be some basis or material for suggesting that questions of public safety, public interest or national security or one or more of these are involved. In some cases it may be quite plain and obvious from the very subject-matter that they are. In others it may not be so. Ultimately it is for the Courts to determine whether, upon the facts and circumstances of a particular case, the plea ought to be upheld.

There are, in my judgment, good reasons of policy to require a public decision-taker to give reasons for his decisions. The first of these I have already made mention of. It is the difference in consequences resulting from the failure of a judge in England and in this country to give reasons for his decision.

Secondly, the furnishing of reasons enables an objective assessment of whether the decision is fair. Hence it forms an integral part of procedural fairness.

Thirdly, the giving of reasons makes for good administration. I have, earlier in this judgment, alluded to the need for Courts to have regard to the national ethos and the aspirations of a democratically elected Government when interpreting the Federal Constitution. There have been repeated calls, by those elected to govern, for the need to have a clean, efficient and trustworthy administration. Courts, by their decisions, must assist in the achievement of the declared policy.

The imposition of a duty upon public decision-takers to furnish reasons in cases affecting fundamental rights achieves the national aim. When a public decision-taker gives reasons, he reveals his mind and exposes for curial scrutiny the basis for his decision.

Administrators will therefore be encouraged to ensure that their decisions are fair and reasonable and in keeping with both legislative policy as expressed in the relevant Act of Parliament and executive policy as declared by the elected Government. Unjustified secrecy for decisions of a public nature, on the other hand, make room for suspicion, distrust and poor administration, leading to inefficiency and unwarranted allegations.

For these reasons, I unhesitatingly reject the eighth submission advanced on behalf of the Minister and the appellant. To reiterate, the Minister, when refusing to refer representations in the exercise of his discretion under s. 20(3) of the Act, is reasonably expected to give reasons for his decision. This is

because the decision he makes has an impact upon a fundamental right conferred by the Federal Constitution. Considerations of feasibility, public interest or national security do not apply here.

Of course, he may not be procedurally compelled to furnish them: see *Sanjiv Oberoi (supra)*. But if he gives no reasons or inadequate reasons, then, it is open for a Court to conclude that he had no good reasons for making the decision he did. The reasons he gives are, of course, subject to curial scrutiny for the purpose of determining whether he had exercised his discretion in accordance with law.

Before departing from this topic, I think it appropriate to refer to the decision of the Indian Supreme Court in *Hochfief Gammon v. State of Orissa* [1975] 2 SCC 649, which was cited by his Lordship Mohd Azmi FCJ in *Wong Yuen Hock (supra)*. Alagiriswamy J, when delivering the judgment of the Supreme Court, after quoting *in extenso* from the speeches in *Padfield (supra)* went on to say as follows (at p. 659 of the report):

> The principles deducible from the decisions of this Court and the above decision of the House of Lords which, though not binding on us, appeals to us on principle may be set out as follows.
>
> The executive have to reach their decisions by taking into account relevant considerations. They should not refuse to consider relevant matter nor should they take into account wholly irrelevant or extraneous consideration. They should not misdirect themselves on a point of law. Only such a decision will be lawful. The Courts have power to see that the executive acts lawfully. It is no answer to the exercise of that power to say that the executive acted *bona fide* nor that they have bestowed painstaking consideration. They cannot avoid scrutiny by Courts by failing to give reasons. If they give reasons and they are not good reasons, the Court can direct them to reconsider the matter in the light of relevant matters, though the propriety, adequacy or satisfactory character of those reasons may not be open to judicial scrutiny. **Even if the executive considers it inexpedient to exercise their powers they should state their reasons and there must be material to show that they have considered all the relevant facts.** (Emphasis added.)

Nature of the Remedy

When a Court finds the Minister's exercise of discretion under s. 20(3) of the Act not to be in accordance with law in the sense I have earlier described, the appropriate prerogative remedy that is normally granted is an order of certiorari. The question is whether, as happened in this case, an order of mandamus may also be granted, compelling the Minister to refer the matter to the Industrial Court. Encik Sivabalah initially argued that it may not. On reflection, however, he agreed that on the footing that the Minister's decision was rightly quashed (which was not conceded) and given that the Minister

had but two choices – whether to refer or not to refer – and he having settled upon the latter choice, all that was left was the former option which could then be enforced by mandamus.

It is convenient at this stage to deal with the argument of Cik Haliza based upon the provisions of Chapter VIII of the Specific Relief Act 1950 and in particular ss. 44, 45 and 49 thereof. It may be recalled that the submission of learned Senior Federal Counsel was to the effect that ss. 44 and 45 were the only provisions of law under which an order of mandamus may be applied for; that no such order had been applied for in the present case and that the learned Judge had accordingly no power to issue the order of mandamus that he did.

I then referred her to para. 1 of the schedule to the Courts of Judicature Act 1964 (to which I shall return in a moment) and to O. 53 of the Rules of the High Court 1980. Her only response to these provisions was that they were merely general in nature and were subject to other specific Acts of Parliament, in this case the Specific Relief Act.

Sections 44, 45 and 49 of the Act of 1950, upon which reliance has been placed read as follows:

> 44. (1) A Judge may make an order requiring any specific act to be done or forborne, by any person holding a public office, whether of a permanent or a temporary nature, or by any corporation or any Court subordinate to the High Court:
>
> Provided that
>
> (a) an application for such an order be made by some person whose property, franchise, or personal right would be injured by the forbearing or doing, as the case may be, of the said specific act;
>
> (b) such doing or forbearing is, under any law for the time being in force, clearly incumbent on the person or Court in his or its public character, or on the corporation in its corporate character;
>
> (c) in the opinion of the Judge the doing or forbearing is consonant to right and justice;
>
> (d) the applicant has no other specific and adequate legal remedy; and
>
> (e) the remedy given by the order applied for will be complete.
>
> (2) Nothing in this section shall be deemed to authorize a Judge:
>
> (a) to make any order binding on the Yang di-Pertuan Agong;
>
> (b) to make any order on any servant of any Government in Malaysia, as such, merely to enforce the satisfaction of a claim upon that Government; or

(c) to make any order which is otherwise expressly excluded by any law for the time being in force.

45. Every application under s. 44 must be founded on an affidavit of the person injured, stating his right in the matter in question, his demand of justice, and the denial thereof, and a Judge may, in his discretion, make the order applied for absolute in the first instance, or refuse it, or grant a rule to show cause why the order applied for should not be made.

If, in the last case, the person, Court, or corporation complained of shows no sufficient cause, the Judge may first make an order in the alternative, either to do or forbear the act mentioned in the order, or to signify some reason to the contrary and make an answer thereto by such day as the Judge fixes in this behalf.

49. Neither the High Court nor any other Court in Malaysia shall hereafter issue any writ of mandamus.

Learned Senior Federal Counsel contended that the requirements of ss. 44 and 45 had not been met and that no order of mandamus could therefore issue. Further, the learned Judge in this case was, according to her, absolutely prohibited from making the order he made because of the terms of s. 49.

Before dealing with the law which I apprehend to be relevant to this part of the case, I shall deal with the last point made by Cik Haliza.

The short answer to her argument mounted on s. 49 is that the learned Judge in this case did not issue a **writ** of mandamus. All he did was to issue an **order** of mandamus. The section having no application to the facts of this case, I entertain little difficulty in rejecting the argument of learned Senior Federal Counsel.

Turning now to the argument that the remedy of mandamus may only be granted in the limited circumstances prescribed by ss. 44 and 45 of the Specific Relief Act, it is to be noted that there are those other two pieces of legislation to which I have referred, that confer power upon the Court to issue mandamus. The first of these is O. 53 of the Rules of the High Court 1980, rr. 1(1), (2) and 2(1) of which read as follows:

1.(1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.

(2) An application for such leave must be made *ex parte* to the Court, except in vacation when it may be made to a Judge in chambers, and must be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits, to be filed before the application is made, verifying the facts relied on.

> 2.(1) When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application for such order must be made by originating motion to a Court, except in vacation when it may be made by originating summons to a Judge in chambers, and, unless the Court or Judge granting leave has otherwise directed, there must be at least eight clear days between the service of the notice of motion or summons and the day named therein for the hearing.

It is apparent from the foregoing provisions that the law has provided avenues to a litigant who is desirous of applying for an order mandamus. He may, quite properly, have resort to either. In our jurisprudence, particularly in the area of public law remedies, it is not uncommon to find two or more avenues being made available for the pursuit of the same remedy.

Thus, in the case of the remedy of declaration, the two alternative recourses made available by the law are s. 41 of the Specific Relief Act on the one hand and the inherent jurisdiction of the High Court on the other. This was recognised by the Federal Court in *Tan Sri Haji Othman Saat v. Mohamed bin Ismail* [1982] 2 MLJ 177 and by this Court in *Attorney-General of Hong Kong v. Zauyah Wan Chik & Ors.* [1995] 3 CLJ 35; [1995] 2 MLJ 620.

Similarly, applications for habeas corpus could, until the repeal of RHC, O. 54, be applied for either under that Order or under s. 365 of the Criminal Procedure Code. See, for example, *Cheow Siong Chin v. Menteri Dalam Negeri, Malaysia* & 2 Ors. [1985] 1 CLJ 229; [1985] 2 MLJ 95 at p. 98.

It is therefore wrong to assume that an applicant is to be limited only to the statutory form of mandamus as provided by Chapter VIII of the Specific Relief Act.

I now turn to consider the second and perhaps wider basis of the High Court's power in the field of public law remedies. It is para. 1 of the Schedule to the Courts of Judicature Act 1964 ('the Schedule') which reads as follows:

> Power to issue to any person or authority directions, orders or writs, including writs of the nature of habeas corpus, mandamus, prohibition, *quo warranto* and certiorari, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose.

The powers conferred by the Schedule upon a High Court are, according to its terms, 'additional powers', that is to say, powers in addition to those already seised of by that Court. Resort may therefore be had to paragraphs in the schedule to found jurisdiction to grant relief not expressly prohibited by written law. This is precisely the approach taken by the Federal Court in *Zainal Abidin v. Century Hotel* [1982] 1 MLJ 260, where it relied upon para. 6 of the Schedule to found the Mareva jurisdiction.

Now, it is settled law that a Schedule to a legislative enactment is part of that enactment and falls to be construed according to its own language and purpose. This approach to the interpretation of schedules to Acts of Parliament appears in the judgment of Roper CJ (Eq.) in *Re Foley* [1952] 53 SR (NSW) 31, 36:

> The Schedule itself, however, is a legislative enactment and is not necessarily wholly constrained by the section of the Act which introduces it, or by its own heading. The principles which ought to be applied in its construction are those set out by Lord Sterndale MR in *I.R. Commrs. v. Gittus* [1920] 1 KB 563 at 576:
>
> > It seems to me that there are two principles or rules of interpretation which ought to be applied to the combination of Act and Schedule. If the Act says that the schedule is to be used for a certain purpose and the heading of the part of the Schedule in question shows that it is *prima facie* at any rate devoted to that purpose, then you must read the Act and the schedule as though the Schedule were operating for that purpose, and if you can satisfy the language of the section without extending it beyond that purpose you ought to do it. But if in spite of that *you find in the language of the Schedule words and terms that go clearly outside that purpose, then you must give effect to them and you must not consider them as limited by the heading of that part of the Schedule or by the purpose mentioned in the Act for which the Schedule is prima facie to be used. You cannot refuse to give effect to clear words simply because prima facie they seem to be limited by the heading of the Schedule and the definition of the purpose of the Schedule contained in the Act.* (Emphasis added.)

It is therefore of paramount importance for a Court to have regard to the particular words used by para. 1 of the Schedule and to give them such effect as would advance their intent and purpose. To that end, the following observations may be made.

First, it is to be noted that the paragraph is not based upon or drawn from any United Kingdom statute. The United Kingdom Supreme Court Act 1981 has no provision that bears close resemblance to para. 1. The paragraph is, however, *in pari materia* with Art. 226(1) of the Indian Constitution which reads as follows:

> Notwithstanding anything in Art. 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases any Government, within those territories, directions, orders or writs, including writs in the nature of habeas corpus, mandamus, *prohibition, quo warranto* and certiorari, or any of them, for the enforcement of any of the right conferred by Part III and for any other purpose.

For completeness, I would add that Part II of the Federal Constitution which contains the fundamental liberties guaranteed by the supreme law, and which finds mention in para. 1 of the Schedule, is the equivalent of Part III of the Indian Constitution.

It follows that, because of the close resemblance in the language of these two provisions – para. 1 of the Schedule and Art. 226 of the Indian Constitution – the decisions of Indian Courts upon the analogous provision are to be accorded greater weight when determining the width of the power conferred by the paragraph, than decisions of Courts in those jurisdictions where the equipollent provision is absent. These jurisdictions include England, Australia, New Zealand and Canada.

Second, it is to be noted that the paragraph primarily deals with public law concepts and public law remedies. The reference to "any authority", which is a term commonly used in public law, and to the remedies of, "habeas corpus, mandamus, prohibition, *quo warranto* and certiorari", all of which are public law remedies, reasonably supports this view.

Third, it is plain that Parliament intended that the High Court should be empowered to grant relief which is ordinarily beyond the scope of the usual public law remedies. That intention finds expression in the word **"including"** which has been interposed between the phrase "directions, orders or writs" and the phrase "writs of the nature of habeas corpus, mandamus, prohibition, *quo warranto* and certiorari, or any others". So too, the phrase "or for any other purpose" with which the paragraph concludes, makes clear the wide area in which the remedies are to operate. These matters, in my judgment, reflect the conferment of a wide power upon the High Court in the matter of public law remedies.

Consequently, the power of the High Court in the field of public law remedies is not confined to the grant of usual prerogative orders known to English law. Our Courts should not consider themselves to be fettered by those antiquated shackles of restrictive traditionalism which the common law of England has imposed upon itself. They are at liberty to develop a common law that is to govern the grant of public law remedies based upon our own legislation. They may, of course, be guided by the decisions of Courts of a jurisdiction which has an analogous provision. But ultimately, they must hearken to the provisions of our own written law when determining the nature and scope of their powers.

In my judgment, the wide power conferred by the language of para. 1 of the Schedule enables our Courts to adopt a fairly flexible approach when they come to decide upon the appropriate remedy that is to be granted in a particular case. The relief they are empowered to grant is by no means to be confined within any legal straightjacket. They are at liberty to fashion the appropriate remedy to fit the factual matrix of a particular case and to grant such relief as meets the ends of justice.

Let me illustrate. Assume for a moment that, an award of the Industrial Court upholding the dismissal of a workman is quashed by certiorari. The ordinary course – and this is the course that would be taken by an English Court – would be to remit the matter to the Industrial Court by way of mandamus to compel it to re-hear the case. But the resultant delay and the inevitable result in the workman's favour may well be compelling factors to justify the award of relief by the High Court.

In a proper case, I envisage no impediment to the High Court making the appropriate determination and awarding fair compensation to the workman. In such cases, it is difficult to see what possible good could come out of prolonging the agony of the parties to the dispute by delaying the matter and adding to the cause list of an already overworked tribunal.

Similarly, if the decision of the Minister not to make a reference under s. 20(3) is quashed, there is no difficulty in issuing a direction addressed to him, requiring him to refer the representations to the Industrial Court. I am therefore satisfied that the concession to this effect by Encik Sivabalah and Cik Haliza was correctly made.

Fact patterns being numerous, examples may be multiplied with no real benefit in point of principle. In the final analysis, it all depends upon the facts of each case and upon an objective assessment how the justice of the case is to be met.

I notice that in the field of public law remedies, Indian Courts, acting on the words of Art. 226(1), have adopted a more flexible stance than their English counterparts.

In *Hindustan Steels Ltd., Rourkela v. A.K. Roy* AIR [1970] SC 1401, the Supreme Court of India, having quashed an order of reinstatement made by the Industrial Tribunal, went on to make an award of compensation. The basis upon which this was done appears in the following passage in the judgment of Shelat J, at p. 1407 of the report:

> The question next is, having held that the order of reinstatement was not a proper order, in that, it was not in consonance with the decided cases, do we simply quash the order of the Tribunal and that of the High Court and leave the concerned workman to pursue his further remedy? The other alternative would be to remand the case to the Tribunal to pass a suitable order. In either case, in view of this judgment, no other order except that of compensation can be obtained by him. If the case is remanded and the Tribunal on such remand passes an order of compensation and fixes the amount such a course would mean further proceedings and a possible appeal. That would mean prolonging the dispute, which would hardly be fair to or conducive to the interests of the parties. In these circumstances we decided that it would be more proper that we ourselves should determine the amount of compensation which would meet the ends of justice.

In *Variety Emporium v. Mohd Ibrahim* AIR [1985] SC 207, Chandrachud CJ considered the principle to be well-settled. He said (at p. 210):

> No authority is needed for the proposition that, in appropriate cases, the Court must have regard to events as they present themselves at the time when it is hearing the proceeding before it and mould the relief in the light of those events.

Workmen of Syndicate Bank, Madras v. Government of India (supra), is yet another case where the Supreme Court fashioned a remedy that was appropriate to the facts and circumstances before it. When allowing the appeal, Bhagwati J said (at p. 686):

> We would direct the Government of India to reconsider the question of making reference of the industrial dispute for adjudication without taking into account the aforesaid irrelevant ground which seems to have prevailed with them in declining to make the references. If the Government of India yet declines to make a reference and the ground on which such reference is declined is improper or irrelevant it would be open to the appellants to make an application to the Court under this appeal and for this purpose, we give liberty to the appellants to apply. The Government of India will give its decision on the question whether the industrial dispute should be referred or not within 45 days from today.

Turning now to the present case, even if I am to conclude that mandamus was wrongly issued by the learned Judge – and I hasten to add that this is not the conclusion I reach – I see no difficulty in substituting it with a direction under para. 1 of the Schedule to the like effect. But I am unable to detect any reason of principle or policy for making such a substitution for the sole purpose of satisfying some antiquated legalism that has its origins in the common law of England.

Here, as earlier observed, the Minister had but two alternatives open to him. He could either refer or decline to do so. He elected the latter course and exhausted so much of the power as distinctly relates to that choice. So, all that is left is the power to refer, which, I am satisfied, is amenable to mandamus. In the circumstances I am unable to accede to the submissions of Counsel directed against the order of mandamus made by the learned Judge. Further, I would, on reflection, add that the observations of Shelat J in *Hindustan Steel Mills (supra)* may be applied *mutatis mutandis* to the present appeals.

Was Certiorari Correctly Issued?

I now turn to consider the question whether the learned Judge was right in issuing certiorari and quashing the Minister's decision not to refer the respondent's representations to the Industrial Court.

Having examined the facts presented to him, the learned Judge concluded as follows:

When I examined the facts of this case and the affidavits filed therein, especially that of affidavit of the applicant, it may well be true, he said, Roger Tan having failed to secure his eviction from the employment of Hong Leong by the aforesaid, demotion then proceeded to frame three charges of alleged misconduct justifying the applicant's dismissal from his 12 years of outstanding service to that of Hong Leong Group.

After having considered this case carefully, I am of the view that had the Minister considered fully this case, he would have come to a different conclusion than he had and I allow this application in terms and the motion prayed for with cost.

The appellant and the Minister have criticised the learned Judge's reasoning. Their criticism is contained in submission (2), the second part of submission (3) as well as in submissions (6) and (7). I do not propose to repeat them here. But I will say at once that I do not accede to any of them.

In my judgment, there are at least five reasons why the learned Judge was right in the conclusion he arrived at.

First, in undertaking a factual analysis, he relied on the judgment of Jemuri Serjan SCJ in *National Union of Journalists (supra)*. That was an authority plainly binding upon him and he therefore acted entirely in accordance with the doctrine of binding precedent. I have demonstrated earlier in this judgment that the decision in *National Union of Journalists* is merely an application of the Hashim Yeop test. A careful reading of the judgment in this case reveals that the learned Judge applied the same test here. There was accordingly no misdirection by him upon the point.

Second, the material that was examined by the learned Judge was the very same as that before the Minister. This comes across from the affidavit of the Minister and from the relevant documents themselves. The allegation of victimisation made by the respondent against Roger Tan and contained in his letter of 19 June 1990 was before the Minister, as were the notes of the domestic inquiry. Accordingly, the criticism that the learned Judge decided the case upon material not made available to the Minister is entirely without foundation.

Thirdly, the representations made by the respondent under s. 20(1) do in fact raise serious questions that merit reference to the Industrial Court. I will not deal with all of them in this judgment. Suffice if I mention four. They are as follows:

(1) The question whether the terms and conditions of employment relied upon by the appellant ever applied to the respondent. It is to be recalled that two of the three charges were founded upon an alleged breach of these. But these terms and conditions were not in existence when the respondent commenced his employment with the appellant. The respondent claims that they do not apply to him. The appellant says that they do. This joinder

gives rise to a question of mixed fact and law requiring full investigation by the Industrial Court which is the body in whom Parliament has vested the relevant adjudicatory power;

(2) The appellant in the first charge alleges that the respondent was under an implied duty to act otherwise than he is alleged to have done. The question whether the term contended for ought to be implied into the respondent's contract of employment is a serious question of law upon which mature argument is required before a decision is reached. The law that governs the implication of terms into a contract, particularly a contract of employment, is not free from difficulty. It is a question upon which even Judges differ. See, for example, *Lim Soo Seng v. Majlis Perbandaran Pulau Pinang* [1990] 1 CLJ 93; [1990] 1 MLJ 22, reversed in [1991] 1 MLJ 162. Also see, the comment upon that case by this Court in *Luggage Distributors (M) Sdn. Bhd. v. Tan Hor Teng* [1995] 2 CLJ 713; [1995] 1 MLJ 719, 752.

Cik Haliza has argued that no consideration ought to be given to this aspect of the case because the respondent had not raised the inapplicability of the terms of employment during the domestic inquiry. The short answer to this submission is that it is not, and has never been the law, that a workman, when making representations under s. 20(1) of the Act, is confined only to those matters which he had raised before a domestic inquiry. If that be the case, then one would be according greater importance to domestic inquiries than what the law says they shall have. The failure of the respondent, who appeared unassisted before the domestic inquiry, to raise this issue does not relieve the Minister from treating it as a serious question which it indeed is.

In the circumstances, I am of the view that the concession made by learned Senior Federal Counsel during her argument that the Minister was under a duty in this case to consider whether the terms of employment actually applied to the respondent represents the true legal position;

(3) The respondent repeatedly denied, during the domestic inquiry, any misconduct on his part. That denial, to borrow the language of Jemuri Serjan SCJ in the *National Union of Journalists* case, "takes a centre stage" in the determination of his guilt or innocence upon the charges brought against him. It is certainly a question that requires to be adjudicated upon;

(4) The allegation of victimisation made by the respondent is certainly one that merits further investigation when viewed against the background of the whole case as outlined with great care by the learned Judge. It may be true or false depending upon the facts as revealed in the course of the proceedings before the Industrial Court. But it must be gone into.

Those, then, are some of the serious questions that have arisen in this case. Applying the Hashim Yeop test, it is plain to see that the representations made by the respondent are neither perverse, frivolous nor vexatious. To say, as

the appellant has said, that the material before the Minister did not disclose any serious questions is to mimic Nelson at Trafalgar and turn a blind eye to the obvious.

Of the complaint of victimisation, it has been submitted by the appellant and the Minister that this was never raised during the domestic inquiry but only much later. That submission goes to the weight of the allegation, which, with respect, is not a matter for the Minister to decide. What weight ought to be assigned to the complaint is for the Industrial Court to determine.

Those familiar with the law and practice in the field of industrial relations will be aware of cases which demonstrate the reluctance of a workman to raise before a domestic inquiry, an allegation of victimisation against one who is seised of managerial power. His immediate concern is to hold on to the job he has. It is therefore not unusual to find a singular lack of motivation on his part to make what management may perceive to be inflammatory statements against a person in authority. One may therefore appreciate such reticence brought about by a desire not to place his sole source of income in jeopardy.

In the proceedings in the Court below, the respondent repeated the allegation of victimisation on oath. There was no affidavit in response from Roger Tan denying this serious allegation. Neither did the appellant put in evidence to explain why this could not be done. It was not a matter that could be brushed aside as being improbable or obviously incredible. The Judge was therefore quite right in taking this allegation of victimisation into account when arriving at his decision. Indeed, I would go so far as to say that it would have been quite wrong for him to have ignored it.

Fourthly, it is clear from the Minister's affidavit that he gave no reasons whatsoever for declining the reference. The affidavit delivered by the Minister in the Court below merely says that he studied and weighed the report sent to him by the Director-General and concluded that this matter was not fit to be referred to the Industrial Court. The affidavit by the Director-General merely indicates the material that was made available to the Minister for his consideration. When a comparison is made, it shows that the material before the Court was the same as that which was placed before the Minister.

There is nothing in these affidavits to show whether the Minister truly appreciated that his decision would have an impact upon the respondent's fundamental liberty, guaranteed by the Federal Constitution. Neither is there any material to show that he had applied his mind to the question whether the representations were frivolous or vexatious. No one can say with any certainty whether he took the domestic inquiry into account or whether he paid it no attention. Of course, if he did give due consideration to the domestic

inquiry, as contended by both Encik Sivabalah and Cik Haliza, then he would, upon the authorities, have taken an irrelevant consideration into account, and for that reason his decision would be bad in law.

It is, I think, appropriate at this stage, to digress and to return to a matter of which I made brief mention very early in this judgment. It has to do with the procedure prescribed for the domestic inquiry conducted by the appellant.

To recall, the terms and conditions of employment relied upon by the appellant – which the respondent has contended have no application to him – contains the following clause:

> If the employee falls to exculpate himself or herself, the appropriate disciplinary action including termination of employment shall be taken against him or her.

It would appear on its plain reading, that the clause effectively places the burden of proving innocence upon the workman. In other words, in all cases where a charge is brought, it is for the workman to prove his innocence: not for the accuser to prove guilt.

The respondent has argued that this clause cuts across the basic fabric of the doctrine of procedural fairness. He has said that it is an unfair procedure. I think that I should refrain from making any comment upon this submission. It is a matter for the Industrial Court to decide. But I would hasten to add that the respondent's contention in this behalf certainly shows that had the Minister addressed his mind to this issue, he may well have referred the representations to the Industrial Court.

Returning now to the mainstream, it is pertinent to ask if the Minister' silence had the effect of binding the Judge hand and foot. With respect, I do not think it did. It must not be forgotten that the effect of the Minister's decision not to refer had the effect of adversely affecting a fundamental right of the respondent. Further, he was duty bound to ensure that the decision he made would further legislative purpose and intent. He is therefore reasonably expected to reveal his mind as to why he chose the course he did. Of course, as a matter of civil procedure, no one can compel him to provide further evidence. But since he has chosen not to give any reasons whatsoever for his decision, one may conclude, as I do in this case, that he had no good reasons for declining the reference.

Fifthly, the facts when objectively viewed leave no doubt that a reasonable Minister similarly circumstanced, that is to say, faced with the facts that presented themselves in this case, would have decided to refer the representations to the Industrial Court.

True, as complained by Counsel for the appellant, the learned Judge may not have indicated with sufficient particularity as to where or how the Minister went wrong. But I do not perceive that to be a fatal error in this case, where the facts and the law sufficiently demonstrate where and how the Minister went wrong.

Conclusion

I have carried out the same exercise as the learned Judge. I too have carefully scrutinised the facts. I have addressed my mind to the relevant law. And I have come to the same conclusion as he did. I am therefore unable to say with any degree of confidence that the learned Judge was wrong in making the orders he did.

For the reasons appearing in this judgment both appeals are dismissed. The orders made by the learned Judge are confirmed. The respondent will have the costs of both appeals but these shall be taxed under a single bill.

The deposit paid by the appellant as security shall be paid out to the respondent to account of his taxed costs.

I must, before concluding this judgment, express my gratitude to all Counsel who appeared in these appeals for their carefully researched submissions. Their efforts have much lightened my burden in deciding these appeals.

Siti Norma Yaakob JCA:

We heard Civil Appeals W-04-19-94 and W-01-21-94 together, although there was no formal order for consolidation as they stem from the same proceedings in the Court below and they also involve the same parties. For the purpose of this judgment I shall refer to Hong Leong Equipment Sdn. Bhd., the appellant in Civil Appeal W-04-19-94 as the 1st appellant and the Minister of Human Resources, the appellant in Civil Appeal W-01-21-94 as the 2nd appellant.

Liew Fook Chuan, the respondent in both appeals, joined the Hong Leong Group of Companies on 1 July 1977 and his first appointment was that of general manager of Malaysia United Paper Product, a subsidiary of Hong Leong. In 1979 he was transferred as the general manager of Hong Leong Yamaha Motors and Hong Leong Yamaha Distributors. Subsequently he was appointed director and general manager of Hong Leong Yamaha Distributors Sdn. Bhd. On 1 February 1987 he became the general manager of the 1st appellant, where he remained until 22 February 1990 when he was dismissed.

During the 12 years that he was with the Hong Leong Group, the respondent had shown himself to be a very shrewd businessman for he was able to turn around losing concerns into profitable ventures and for this achievement he

earned himself the prestigious Hong Leong Group Chairman's Award for management excellence for the fiscal years 1980/1981 and 1984/1985 which carries a cash of RM1,000,000 each.

In addition he captured the Malaysian market in promoting the sales and distribution of Yamaha motorcycles and for this he received a letter of appreciation from the President of the Yamaha Motor Co. Ltd. of Japan.

Despite recognising his management abilities, the 1st appellant sent two show cause letters to the respondent. The first dated 27 November 1989 queried the respondent of the role he played in the sale of a piece of land belonging to Kee Huat Radio Sdn. Bhd. to Hong Leong Industries Bhd. Although the sale transaction took place in 1983, the query only came into being in 1989 and that too following the respondent's testimony in proceedings before the Sessions Court in Kuala Lumpur Civil Suit C6875/85. The respondent had testified that when he negotiated for the purchase of the land on behalf of Hong Leong Industries Bhd., he was aware that his brother was the broker as the latter introduced the land to him but this fact was not disclosed by the respondent to his principal. It was this omission to disclose that prompted the 1st appellant to query the respondent as the 1st appellant maintained that as an employee, the respondent was legally and contractually bound not to place his personal interest in conflict with the company's interest. The respondent was given ten days within which to reply to four specific questions stated in the letter failing which the respondent would be assumed to have no explanation to offer and appropriate action would be taken against him.

The respondent tendered his replies to the four questions by letter dated 18 December 1989, following an extension of time to do so.

At about the same time, the respondent received the second show cause letter dated 14 December 1989 from the 1st appellant and this time the respondent was asked to explain his involvement in a company known as Asia-Pacific Advisory Group Sdn. Bhd. (APAG). A search at the Registrar of Companies revealed that the respondent had been a director of APAG since 16 October 1989, a fact that was again not disclosed to the 1st appellant. Like the first show cause letter, the second one also gave the respondent time of seven days within which to reply to three specific questions and the replies were accordingly tendered by the respondent through his letter dated 18 December 1989.

In both show cause letters, the 1st appellant made it very clear that the respondent's omissions to disclose were breaches of his legal duty as well as his contractual duty as embodied in s. B1 of the Group Personnel Regulations and Policies setting out the Terms And Conditions Of Employment For Executives in the Hong Leong Group.

Following the receipt of the replies, the 1st appellant through its letter dated 5 January 1990 informed the respondent that a domestic inquiry on a date to be fixed would be held in respect of the alleged breaches and pending the hearing he was suspended from work.

By letter dated 16 January 1990, the respondent was informed that the domestic inquiry would be held on 6 February 1990 where he was to answer to three charges of misconduct which were framed as follows:

First Charge

> That in the transaction for the sale and purchase of the land held under State Lease 4249 Lot No. D 271 Section 20, Petaling Jaya ('the land') between Kee Huat Radio ('the vendor') and Hong Leong Industries Bhd. ('the purchaser'), you had entered into negotiations with Mr. Teo Chiang Kok, the agent ('the agent') of the registered owner of the land, without informing your superior(s) of your brother's interest as broker for the transaction and obtaining their prior approval for your undertaking and continuation of your negotiation, notwithstanding your brother's said interest. In so doing you had put yourself in a position where your personal interest would or might conflict with the interest of the Hong Leong Industries Group without the prior knowledge and consent of your superior(s). This is in breach of your duties and responsibilities and the implied terms and conditions of your employment.

Second Charge

> That you had engaged and/or concerned yourself and/or had an interest in the business of Asia-Pacific Advisory Group Sdn. Bhd. without obtaining the prior written approval of the Board of Directors of Hong Leong Equipment Sdn. Bhd. or the Board of Directors of Hong Leong Management Co. Sdn. Bhd. This is in breach of your terms and conditions of employment set out in item 4(a)(ii) of s. B1 of the Hong Leong Group Manual on Personnel Regulations and Policies.

Third Charge

> That you had engaged and/or concerned yourself and/or had an interest in the business of Finnova Corporation Sdn. Bhd. without obtaining the prior written approval of the Board of Directors of Hong Leong Equipment Sdn. Bhd. or the Board of Directors of Hong Leong Management Co. Sdn. Bhd. This is in breach of your terms and conditions of employment set out in item 4(a)(ii) of s. B1 of the Hong Leong Group Manual on Personnel Regulations and Policies.

The third charge was as a result of reports which had appeared in three local dailies, Business Times dated 4 January 1990, The Star dated 5 January 1990 and Berita Harian dated 31 January 1990. All three reports featured Finnova Corporation Sdn. Bhd. as the Malaysian partner to market mobile telecommunication products on a joint venture with Benefon Oy, a Finnish telephone manufacturer and that the 1st respondent was described as the adviser to the Malaysian company.

On 6 February 1990, the Panel conducting the domestic inquiry found the respondent guilty of all three charges and by letter dated 22 February 1990, the 1st appellant dismissed him with immediate effect.

Aggrieved by his dismissal, the respondent by letter dated 11 April 1990 appealed to the Director-General for Industrial Relations under s. 20(1) of the Industrial Relations Act 1967 ('the Act'), to be reinstated in his former employment on the grounds that his dismissal by the 1st appellant was without just cause or excuse.

The Director-General in compliance with his statutory duties under sub-s. (2) of s. 20 of the Act, convened a conciliatory meeting on 3 May 1990 and when he realised that no settlement could be reached he accordingly notified the 2nd appellant so on 20 October 1990.

By letter dated 13 November 1990, the 2nd appellant acting under s. 20(3) of the Act, informed the respondent that he had decided not to refer the matter of his dismissal to the Industrial Court.

On 21 December 1990, the respondent filed an *ex parte* application for leave:

(1) to apply for an order of certiorari to quash the decision of the 2nd appellant dated 13 November 1990, not to refer the matter of his dismissal to the Industrial Court;

(2) to apply for an order of mandamus for the purpose of ordering the 2nd respondent to refer the matter of his dismissal to the Industrial Court for an award.

That leave was granted on 16 January 1992 and on the hearing of the merits of the originating motion for the orders of certiorari and mandamus, Abu Mansor Ali J (as he then was) allowed the respondent's application and ordered the issue of the two prerogative orders in the manner prayed for by the respondent.

It was under these circumstances that separate notices of appeal were filed by the 1st and 2nd appellants, against the decision of Abu Mansor Ali, J as he then was) made on 14 September 1994.

Before us what is being questioned is the nature and extent of the 2nd appellant's discretion in deciding whether to refer or not to refer a dispute to the Industrial Court. The fact that such a duty imposed by sub-s. (3) of s. 20 of the Act is wholly discretionary is not disputed. What is contended by both appellants is that on the materials placed before the 2nd appellant, there is no room for this Court to interfere with the discretion exercised by the 2nd appellant in refusing to refer the respondent's dismissal to the Industrial Court as there is no evidence to suggest that the 2nd appellant had exercised that discretion for an improper motive or that he had misdirected himself in law or had taken into account irrelevant or extraneous matters or failed to take into

account relevant matters. See the case of *Minister of Labour, Malaysia v. Lie Seng Fatt* [1990] 1 CLJ 1103; [1990] 2 MLJ 9. Thus faced with all the relevant materials before him, any other reasonable Minister similarly circumstanced would have come to the same decision as did the 2nd appellant in this case.

On the same token, the appellants maintain that in quashing the 2nd appellant's decision, the trial Judge had assumed the erroneous stand that any dispute not resolved should be referred to the Industrial Court and in so deciding the trial Judge had considered the merits of the respondent's complaint and treated the whole matter as if on appeal and not by way of a review.

The discretion conferred on the 2nd appellant under sub-s. (3) of s. 20 of the Act has been held by the Supreme Court in *Lie Seng Fatt's* case *supra,* to be wide and fettered and, "so long as he exercises the discretion without improper motive, the exercise of discretion must not be interfered with by the Court unless he had misdirected himself in law or had taken into account irrelevant matters or had not taken into consideration relevant matters or that his discretion militates against the object of the statute. Otherwise he had a complete discretion to refuse to refer a complaint which is frivolous or vexatious."

Are the facts and circumstances of the respondent's complaint in this case frivolous or vexatious as to warrant the 2nd appellant's refusal to refer the complaint to the Industrial Court? This must depend on the materials that were placed before him and his assessment of such materials. What were those materials? They are all documentary in nature and in respect of the three charges preferred against the respondent, this must include the notes of evidence of the proceedings of Civil Suit C6875/85, the certified searches made with the Registrar of Companies as to the compositions of APAG and Finnova Corporation, the Manual containing terms and conditions of employment for executives in the Hong Leong Group, ('the Manual') the newspaper reports from Business Times dated 4 January 1990, The Star dated 5 January 1990 and Berita Harian dated 31 January 1990. In addition there are also the panel's notes of evidence and findings of the domestic inquiry conducted on 6 February 1990, notes of the conciliatory meetings conducted by the Director-General with the 1st appellant and the respondent, the Director-General's report, correspondence passing from the respondent to the Director-General and *vice versa* and the relevant provisions of the Act. It was upon consideration of all these materials that the 2nd appellant notified the respondent on 13 November 1990 that his complaint over his dismissal was not a fit and proper one to be referred to the Industrial Court. Clearly this is not the case where the 2nd appellant acted on insufficient evidence but the issue is whether on the evidence placed before him has he acted fairly and reasonably when exercising his discretion not to refer? In *Doody v. Secretary of State for the Home*

Department and Other Appeals [1993] 3 All ER 92, Lord Mustill held that, "Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances."

In his one-sentence letter informing the respondent of his decision, the 2nd appellant gives no reason for his decision and likewise in his affidavit in reply. There is no statutory duty to give reasons but in the modern climate of administrative law, such an omission may no longer be justified. "The giving of reasons may be inconvenient, but I can see no ground at all why it should be against the public interest: indeed rather the reverse. This being so, I would ask simply: is a refusal to give reasons fair? I would answer without hesitation that it is not" per Lord Mustill in *Doody's* case, *supra.*

Nearer at home the situation can be gauged from the cases of *Minister of Labour, Malaysia v. Chan Meng Yuen and Another Appeal* [1992] 2 CLJ 1808; [1992] 2 MLJ 339; *Minister of Labour, Malaysia v. National Union of Journalists, Malaysia and Another Appeal* [1991] 1 CLJ 31; [1991] 1 MLJ 24 and *Minister of Labour, Malaysia v. Sanjiv Oberoi & Anor.* [1990] 1 CLJ 44; [1990] 1 MLJ 112. "The only significance of the absence of reasons is that if all other known facts and circumstances appear to point overwhelmingly in favour of a different decision, the decision maker, who has given no reasons, cannot complain if the Court draws the inference that he had no rational reason for his decision." per Lord Keith of Kinkel in the case of *Regina v. Secretary of State for Trade and Industry, ex parte Lonrho Plc* [1989] 1 WLR 525, a pronouncement that was approved and adopted by the Supreme Court in *Chan Meng Yuen's* case, *supra.*

In the light of the 2nd appellant's omission to give reasons for his decision, can this Court, like the Court of first instance go into the merits of the respondent's complaint to see whether it is frivolous or vexatious and whether the 2nd appellant had acted fairly and reasonably in deciding as he did? I answer this question positively provided that such considerations are limited to the materials that were before the 2nd appellant for as Courts of review, both the Court of first instance and this Court cannot go beyond what had already been placed before the 2nd appellant, for his consideration. As authority for this see the cases of *Lie Seng Fatt (supra)*, *National Union of Hotel, Bar and Restaurant Workers v. Minister of Labour and Manpower* [1980] 2 MLJ 189, and *Chan Meng Yuen (supra)*, where the Court concerned went through the merits of each complaint when deciding whether such complaint is perverse, frivolous or vexatious.

Having stated this, I shall now deal specifically with the three charges that were preferred against the respondent.

The first charge alludes to a personal interest conflict situation, a breach of the respondent's duties and responsibilities as an employee and the offence allegedly committed by the respondent is two-fold.

(1) His omission to disclose to his employer his brother's interest, as a broker, in the land transaction that was negotiated by the respondent on behalf of the purchaser, a member of the Hong Leong Group and

(2) His omission to obtain the 1st appellant's approval to continue negotiating for the purchase of the land.

It is not disputed that:

(1) the sale took place nine years before the charge was framed against the respondent;

(2) It was done at arm's length accompanied by the necessary valuation prepared by Hong Leong and at market value;

(3) the respondent's brother did not receive any commission from Hong Leong as his commission came from a third party.

Thus the only offence that is alleged by the first charge is the offence of non-disclosure of a relative's interest.

At the domestic inquiry held on 6 February 1990, the respondent denied the first charge and his defence was that he may have informed his superior of his brother's involvement in the sale but he was not sure as the sale took place eight years earlier. He maintained the same reply when he was challenged with the evidence he gave in the Sessions Court where he had testified that there was no necessity for him to disclose his brother's interest to the board.

Despite his denial, the panel found him guilty of the first charge.

I take the 2nd and 3rd charges together as they relate to the respondent's breaches of his terms of employment for failing to secure the written approval of the board of directors of his company before engaging in the businesses of APAG and Finnova Corporation. Under item 4(a)(ii) of the Manual under which the two offences were founded, an executive like the respondent, shall devote his whole time solely to the business of the Hong Leong Group and shall not be concerned directly or indirectly in any business other than the Hong Leong Group.

The respondent also denied these two charges and in respect of APAG, his defence was that the company is a dormant family holding company with a RM2 share capital, the two shareholders being himself and his wife. He is

also a director together with his wife and two others and he denies that he had taken employment with APAG and that his equity holding of RM1 is too insignificant to invite a written approval.

With regard to Finnova Corporation, he gave no explanation to the Panel when faced with the newspaper reports describing him as the Malaysian Adviser to the joint venture company. However in a subsequent affidavit filed in proceedings in the Court below, he states he is neither a shareholder, a director nor held any office of profit with the company. His position as the honorary adviser to the company was to lend moral support to the managing director, his wife who was entering into a new business venture.

The Panel also found him guilty of both the 2nd and 3rd charges, and the penalty imposed by the 1st appellant on the respondent for the acts of misconduct framed by the three charges was his dismissal, thereby depriving him of his livelihood and his right to work, which his Counsel, Dato V.K. Lingam, likened to a fundamental right with a proprietary value.

As a Court of review this Court is not seised with the jurisdiction of determining whether the dismissal was fair or unfair. That is the function of the Industrial Court, before whom the respondent wants to be heard, but the way to the Industrial Court is through the 2nd appellant who has been conferred the discretion to act fairly and justly when determining whether to refer or decline to refer the respondent's complaint to the Industrial Court. The respondent has maintained that he is innocent of the alleged acts of misconduct and in the Court below submitted that such acts of misconduct were the result of the vindictive actions of one Roger Tan, the managing director of the 1st appellant. The respondent cites two instances of victimisation practised on him by Mr. Roger Tan.

The first relates to the manner by which the contract to construct the headquarters of one of Hong Leong's subsidiaries was to be awarded. Whilst Mr. Roger Tan preferred the contract to be negotiated privately with one contractor, the respondent insisted that the award be made by way of open tender. Unknown to the respondent Mr. Roger Tan had already awarded the contract for the foundation works to a particular contractor.

Tenders were then invited and in the exercise that followed, it was discovered that the contractor who was already awarded the contract for the foundation works had failed to secure the contract for the construction of the main building with a price difference of RM1 million. The respondent found out later that the difference represented the price of the contractor's house which was sold to Mr. Roger Tan.

The other instance of alleged victimisation cited by the respondent was what he considers was Mr. Roger Tan's action in demoting him from being the director/general manager of Hong Leong Yamaha Distributors Sdn. Bhd., a

highly successful and profitable company to that of general manager of the 1st appellant which was then running at a loss. The respondent managed to turn the 1st respondent into a profitable concern, thereby disappointing Mr. Roger Tan who had expected him to resign. It is the respondent's contention that it was this failure to remove him from the 1st respondent that prompted Mr. Roger Tan to frame the three charges against him.

The objection placed by the 1st appellant to this allegation of victimisation is that it was not raised by the respondent as his defence at the domestic inquiry, where he had every opportunity to do so, but only subsequently in proceedings in the High Court and as such the defence could not possibly form part of the materials considered by the 2nd appellant.

My answer to the objection is simply this. It must be appreciated that at the domestic inquiry it cannot be ruled out that the respondent must have entertained the possibility that the ultimate penalty he would face for his alleged misconduct was dismissal. It would not be to his own interest that he should defend himself by accusing his own managing director of victimising him. At that stage the prospect of him being cleared of the three charges and returning to his job or receiving a minimum sentence not involving dismissal was still possible but once dismissal was pronounced, there was no reason why the respondent should keep quiet about his allegation. Thus the fact that the defence of victimisation was not raised contemporaneously at the domestic inquiry does not disentitle the respondent raising it subsequently in proceedings to have his dismissal questioned.

The allegation of victimisation is a very serious charge not to be taken lightly or brushed aside a being trivial and it warrants the Industrial Court to inquire whether such a charge can be made out or not. This is more so in this case as Mr. Roger Tan did not file any affidavit to rebut the allegation except for a general denial by one Mr. Lim How Soon, a director of the 1st appellant, which is hearsay evidence and not convincing enough.

It is also not correct to maintain that the 2nd appellant could not have been made aware of the defence of victimisation as there is evidence that the respondent had attached a statement to his letter of appeal to reinstate dated 19 June 1990 addressed to one Mr. A. Murugavell, the officer in the Industrial Relations office, who was conducting the conciliatory meetings between the respondent and the 1st appellant. In his statement, the respondent sets out his career history in the Hong Leong Group and this included his allegation of victimisation at the hands of Mr. Roger Tan. This letter and statement must form part and parcel of the materials that were forwarded by the Director-General to the 2nd appellant and the latter cannot now be heard to say that he was not made aware of the respondent's defence of victimisation.

The 2nd and 3rd charges relate to breaches of the respondent's terms and conditions of employment as set out in item 4(a)(ii) of s. B1 of the Manual. In the Court below the respondent maintained that the Manual does not bind him as it was issued on 1 January 1981, long after he had joined the Hong Leong Group on 1 July 1977 and on terms and conditions that are different to the Manual. As such the Manual together with the amendments made to s. B1 on 8 September 1987, are not applicable to him but only to executives who joined the Hong Leong Group on or after 1 January 1981.

There is no affidavit evidence from the 1st appellant to rebut the respondent's contention. It remained silent and had not replied to the respondent's contention that the Manual does not bind him.

Whilst it is true that the respondent had not objected to the Manual earlier before the panel conducting the domestic inquiry and consequently such an objection could not have been placed before 2nd appellant, I see no reason why such omission should act against the respondent's own interest.

It must be remembered that the 2nd and 3rd charges are penal in nature and one of the matters to be established to support the two charges is whether the respondent is bound by the Manual. It is in this respect that item 5 of s. B1 of the Manual sets out the procedure to be followed in disciplinary proceedings before the panel. That clause provides that if, "the employee fails to exculpate himself or herself, the appropriate disciplinary action including termination of employment shall be taken against him or her." The respondent is charged with the heavy burden of proving innocence, a reversal of the accepted norm where the burden is on the accuser to prove the guilt of the accused.

It is no wonder that the panel found him guilty of all the three charges as he had a very heavy burden to discharge.

It is also clear from the notes of the proceedings that the Panel did not state any reasons why it found the respondent guilty of all three charges. The respondent did not have the benefit of legal advice as he was unrepresented before the Panel.

As the 2nd appellant had not given any reason for his decision, there is no knowing whether he had considered the defence of victimisation or that the Manual was not applicable to the respondent and that the high burden placed on the respondent works unfairly towards him. The very fact that the 2nd appellant refused to refer points to the possibility that he had failed to consider those matters which another Minister, similarly circumstanced would have done and come to the inescapable conclusion that the respondent's complaint is not perverse, frivolous or vexatious.

The respondent had denied the three charges, he had raised the defences of victimisation and that the Manual which reverses the burden of proof was not applicable to him. Moreover the Act itself is a piece of social legislation by which disputes between employers and their workmen are to be speedily settled or resolved and when interpreting such an Act, the liberal approach is to be taken as opposed to a restrictive one. See the case of *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia* [1996] 4 CLJ 687; [1995] 3 MLJ 369. However when such a dispute cannot be settled amicably, Parliament has conferred the 2nd appellant with the discretion to refer such dispute to the Industrial Court provided that the dispute is not frivolous or vexatious. On the facts of this case it cannot be said that the respondent's complaint is frivolous or vexatious as there are sufficient materials disclosed which ought to have influenced the 2nd appellant to refer the dispute to the Industrial Court. The fact that he did not militates against the object of the Act.

The learned trial Judge had also issued an order of mandamus ordering the 2nd appellant to refer the respondent's dismissal to the Industrial Court for an Award. Puan Haliza Aini Othman, Senior Federal Counsel for the 2nd appellant argues that the order for mandamus cannot be maintained as it was applied under O. 53 of the Rules of the High Court, a subsidiary legislation when there are provisions for such a remedy in a specific Act, namely ss. 44 and 45 of the Specific Relief Act 1950. She contends that the order of mandamus should have been applied for under the provisions of the specific Act and not under the Rules and submits further that since the requirements of ss. 44 and 45 of the Specific Relief Act 1950 have not been complied with, the order of mandamus could never have been issued. Furthermore the learned trial Judge is barred by the provisions of s. 49 of the same Act from issuing a writ of mandamus.

Since both the 1980 Rules and the 1950 Act contain provisions for the issue of the order of mandamus I consider that it is open to the respondent to choose under which law he wishes to proceed. Since he has elected to apply for the order of mandamus under the Rules, so be it. As such reliance on s. 49 of the Specific Relief Act 1950 is of no consequence and in any event it speaks of a writ of mandamus when what is being applied for is an order of mandamus.

On the other hand Mr. Sivabalah learned Counsel of 1st appellant concedes that once the Court finds that the exercise of the discretion by the 2nd appellant is erroneous, the right to refer is amenable to mandamus. However he pointed out that the form of the mandamus as issued by the learned trial Judge is wrong as it orders the 2nd appellant to do a certain act in a certain way. Since sub-s. (3) of s. 20 of the Act confers the 2nd appellant with the discretion of either to refer or decline to refer a dispute to the Industrial Court, the proper form of the mandamus should be couched in words like requiring the 2nd appellant to reconsider his decision according to law.

As the objection is only to language rather than substance, there is actually no serious objection as to how the mandamus should be worded. Since the power to refer is amenable to mandamus I see nothing objectionable to the order given by the learned trial Judge that mandamus be issued directing the 2nd appellant to refer the respondent's dismissal to the Industrial Court for an award.

For the reasons that I have stated the decision of the learned trial Judge does not warrant any interference from this Court. To that end Civil Appeals W-04-19-94 and W-01-21-94 are dismissed with costs, the decision of the learned Judge is affirmed and the respondent will have the costs of both appeals to be taxed under a single bill.

Ahmad Fairuz JCA:

I have had the benefit of reading the judgment of my learned brother Gopal Sri Ram JCA in draft and agree with his reasons and conclusions.

Reported by Prof. Ahmad Ibrahim